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2980 Nos. 15225-15226

United States
Court of Appeals
for the Ninth Circuit

REAR ADMIRAL A. M. BLEDSOE, U. S. Navy; CAPT.
J. J. GREYTAK, U. S. Navy, et al.,

Appellant,

vs.

UNITED STATES, ex rel., LOUIS V. BOSCOLA,

Appellee.

CHARLES S. THOMAS, Assistant Secretary of Defense for
the Navy, et al.,

Appellant,

vs.

UNITED STATES OF AMERICA on the Relation of Peter
J. Smith,

Appellee.

Transcript of Record

Appeals from the United States District Court for the
Western District of Washington.
Northern Division.

FILED

JAN - 7 1957

✓ ✓
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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RUMMENS, GRIFFIN, SHORT & CRESSMAN,
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Attorneys for Appellee, Peter J. Smith.

In the District Court of the United States, for the
Western District of Washington, Northern
Division

No. 4101

UNITED STATES, Ex Rel., LOUIS V. BOS-
COLA,

Petitioner,

vs.

REAR ADMIRAL A. M. BLEDSOE, U. S. Navy;
CAPT. J. J. GREYTAK, U. S. Navy; and
CHARLES S. THOMAS, Assistant Secretary
of Defense for the Navy,

Respondents.

PETITION FOR WRIT OF
HABEAS CORPUS

Comes Now the petitioner, and respectfully shows
to the above-entitled court as follows:

I.

Jurisdiction of the above-entitled court arises pur-
suant to 28 U.S.C. 2241 (C-1).

II.

Petitioner is now held in custody in restraint of
his liberty, under the color and authority of the
laws of the United States, and that he has been
committed for trial before a general court-martial
of the U. S. Navy, under color of the provisions of
50 U.S.C.A. § 552 (4), pursuant to the orders of the
respondents herein.

III.

That petitioner is a citizen of the United States and is a lawful resident of the city of Bremerton and State of Washington. That on May 29, 1946, petitioner completed 30 years of service in the United States Navy for pay purposes; that on May 31, 1947, petitioner was released from active duty with the United States Navy, and subsequently on April 1, 1947, petitioner was released from all active duty, given 30 days terminal leave, and retired from the U. S. Navy, having at that time completed 30 years, 7 months, and 23 days of honorable navy service as a chief musician (MUC).

IV.

That petitioner thereupon returned to civilian life, and subsequently on January 8, 1954, petitioner was charged with the crime of carnal knowledge in the Superior Court of the State of Washington, in and for Kitsap County, under Docket No. 33091; that petitioner entered a plea of guilty to said charge, and was sentenced to a maximum of 15 years in the Washington State penitentiary at Walla Walla, Washington. That subsequently, on January 31, 1956, under recommendations of the Washington State Board of Prison Terms and Paroles, petitioner was released from the Washington State Penitentiary at Walla Walla, Washington, on parole. That, upon petitioner's release from the Washington State Penitentiary on January 27, 1956, respondents, acting by and through their authorized agents took petitioner into custody at Walla Walla,

Washington, and informed him that he was being involuntarily returned to active duty, under color and authority of Article II (4), U.S.M.J., 50 U.S.C.A. § 552 (4) and under Article C-10330 (1) Bupers Manual; that a copy of the purported active duty orders were served upon petitioner, and pursuant to such mandate, petitioner was involuntarily transported to the U. S. Naval Station, Seattle, Washington, and has since said time been on active duty in the U. S. Navy, at said naval station against his will.

V.

That respondents' recall of petitioner to active duty was in violation of the provisions of 34 U.S.C.A. § 433, which section authorizes the Secretary of Navy to recall retired enlisted men into active duty "in time of war, or when a national emergency exists"; that at the time of petitioner's recall into active duty by respondents, the United States was not in a state of war, nor was there a national emergency in existence.

VI.

That respondents, acting by and through their authorized agents have conducted a hearing as to certain alleged criminal violations of the Uniform Code of Military Justice, which allegedly occurred on January 8, 1954, and as a result of this hearing, the respondents, on the 2d day of March, 1956, ordered the petitioner to be brought to trial before a general court-martial, appointed and convened by

Rear Admiral A. M. Bledsoe, Commandant, 13th Naval District.

VII.

That respondents threaten to forthwith proceed to bring petitioner to trial before a general court-martial, having charged petitioner with an alleged offense in violation of the Uniform Code of Military Justice, under Article 120, 50 U.S.C.A. §714. That said charge is for the same act for which petitioner was previously tried and found guilty by the superior court of the State of Washington, in and for Kitsap County, under Docket No. 33091, and is the same offense for which petitioner has previously served two years of a maximum 15-year sentence, at the Washington State Penitentiary at Walla Walla, Washington, and that the trial of petitioner under the said general court-martial will result in petitioner's being twice put to trial for the same offense.

VIII.

That respondents are proceeding illegally and without jurisdiction in holding petitioner to stand trial by general court-martial for the following reasons:

1. 34 U.S.C.A. § 433 does not authorize respondents or any other person to return a retired enlisted man to active duty other than "in time of war, or when a national emergency exists."

2. That the alleged crime of which petitioner is accused occurred at a time when petitioner had been

retired from the U. S. Navy for a period of six years.

3. That the actions of respondents are in violation of amendments V and VI, U.S. Constitution.

4. That the provisions of Article II, (4) U.C.M.J., 50 U.S.C.A. § 552 (4), have no application to retired enlisted personnel, and that it was not the intention of the legislature that retired enlisted personnel be subjected to courts-martial jurisdiction after retirement.

5. That the trial of petitioner by general court-martial by respondents bears no relation to the enforcement of discipline or to the regulation of the armed forces of the United States.

6. That Article II (4), U.C.M.J., 50 U.S.C.A. § 552 (4), insofar as it purports to subject retired enlisted personnel to trial by general courts-martial after retirement is unconstitutional and in violation of Amendments V and VI, U.S. Constitution.

7. That petitioner is still under the continuing jurisdiction of the Superior Court of the State of Washington, in and for Kitsap County, until such time as petitioner completes the provisions of his parole.

Wherefore, Petitioner prays that the above-entitled court issue an order requiring respondents to appear and show cause on a date to be set by the court, why a Writ of Habeas Corpus should not

be granted, directed to Rear Admiral A. M. Bledsoe, U.S. Navy, and Capt. J. J. Greytak, U.S. Navy, or any other persons who threaten to detain and bring petitioner to trial by general court-martial pursuant to respondents' order, requiring said respondents to release petitioner from all restraint, authority and control.

Petitioner further prays that pending the determination of the issues herein, that said respondents be directed to release petitioner.

Petitioner further prays the court to grant such further and other relief to petitioner that may be found just and proper in the premises.

DAY & WESTLAND,
Attorneys for Petitioner.

State of Washington,
County of King—ss.

Louis V. Boscola, being first duly sworn, upon oath deposes and says:

That I am the petitioner in the foregoing petition for a Writ of Habeas Corpus; that I have read the above and foregoing petition for Writ of Habeas Corpus, know the contents thereof, and believe the same to be true.

/s/ LOUIS V. BOSCOLA.

Subscribed and sworn to before me this 7th day of March, 1956.

[Seal] /s/ RICHARD REINERTSEN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed March 7, 1956.

[Title of District Court and Cause.]

No. 4101

ORDER TO SHOW CAUSE

This matter having come on before the undersigned judge for the above-entitled court, in open court, upon the petition of Louis V. Boscola for a Writ of Habeas Corpus, and the court having read said petition, considered the same, and being fully advised in the premises, now therefore,

It Is Hereby Ordered that Rear Admiral A. M. Bledsoe, U.S. Navy, and Capt. J. J. Greytak, U.S. Navy, and Charles S. Thomas, Assistant Secretary of Defense for the Navy, or any other person or persons who may be temporarily acting on their behalf, be and they hereby are ordered to appear before the undersigned judge of the above-entitled court, at his courtroom, in the United States Court House, in the City of Seattle, County of King, State of Washington, at the hour of 2:00 p.m. on Monday, the 2nd day of April, 1956, and to then and there

show cause, if any there be, why the prayer of Louis V. Boscola should not be granted.

Done in Open Court this 7th day of March, 1956.

/s/ WILLIAM J. LINDBERG,
Judge.

Presented by:

DAY & WESTLAND,
Attorneys for Petitioner.

[Endorsed]: Filed March 7, 1956.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 4105

UNITED STATES OF AMERICA, on the Rela-
tion of PETER J. SMITH,

Relator,

vs.

CHARLES S. THOMAS, Assistant Secretary of
Defense for the Navy; A. M. BLEDSOE, Rear
Admiral, U.S. Navy; and J. J. GREYTAK,
Captain, U.S. Navy,

Respondents.

PETITION FOR WRIT OF
HABEAS CORPUS

To the Honorable William J. Lindberg, Judge of
the Above-Entitled Court:

Comes Now Peter J. Smith and respectfully peti-
tions and shows the Court as follows:

I.

Jurisdiction of this cause is vested in this Court pursuant Title 28 U.S. Code, Section 2241 (C-1).

II.

Your petitioner is a citizen of the United States and resides within the Western District of Washington, Northern Division; that petitioner is unlawfully imprisoned and detained under color and authority of the laws of the United States; that he has been committed for trial before a general court-martial of the United States Navy under color of the provisions of 50 U.S.C.A. Section 552 (4) pursuant to pretended orders of the respondent, J. J. Greytak, Captain, U.S. Navy, Commandant U.S. Naval Station, 13th District, who in turn is acting pursuant pretended orders of respondent A. M. Bledsoe, Rear Admiral, U.S. Navy, Commandant 13th Naval District, who in turn is acting pursuant pretended orders of respondent Charles S. Thomas, Assistant Secretary of Defense for the Navy.

III.

That such imprisonment and detention are unlawful and the asserted jurisdiction of the respondents over the person of the petitioner is unlawful in that petitioner entered the service of the U.S. Navy by enlistment in November, 1924, and after 22 years, 3 months and 26 days of service transferred to the Fleet Reserve and was released to inactive duty December 29, 1946, and having completed 30 years

of service for pay purposes on August 19, 1954, he was thereafter placed on the U.S. Navy retired list effective September 1, 1954.

IV.

That on or about the 29th day of December, 1952, your petitioner upon his plea of guilty, was found guilty of the charge of manslaughter by the Superior Court of the State of Washington for Kitsap County in cause No. 30785 and was duly sentenced on said date to the State Penitentiary at Walla Walla, Washington, said offense having been committed in Kitsap County, Washington, May 23, 1952.

V.

That on or about the 31st day of January, 1956, your petitioner was released from said penitentiary into the custody of the Washington State Board of Prison Terms and Paroles on parole; that on said date respondents through their duly authorized agents took petitioner into custody pursuant to purported orders of respondents, recalling petitioner to active duty in the U.S. Navy for the purpose of court-martial; that thereafter and on March 2, 1956, said respondents caused orders to be issued directing the court-martial of your petitioner on a charge of murder or manslaughter.

VI.

That the imprisonment and detention of petitioner and the purported attempt to court-martial petitioner is unlawful in that the crime to which peti-

tioner entered a plea of guilty was not committed while he was on active duty or otherwise under the jurisdiction of the U.S. Navy. That no right in law or statute exists authorizing the U.S. Navy or respondents to recall the petitioner to active duty.

VII.

That the U.S. Navy and respondents are without right under the law or the constitution to again try petitioner for an offense for which he has been once tried, convicted, served the sentence imposed and paid the full penalty therefor. That the actions of respondents are without warrant or authority in law and violate the constitutional and statutory rights of petitioner; that the purported recall to active duty and attempted court-martial of petitioner by respondents bears no reasonable relationship to the maintenance of discipline or regulations of the Naval forces of the United States.

VIII.

That petitioner is without available remedy other than the filing of this petition.

Wherefore, your petitioner respectfully prays that a Writ of Habeas Corpus issue out of this Court and cause directed to respondents commanding them to produce the body of Petitioner before this Court together with the cause of his detention and to do and receive what shall then and there be considered concerning him and then and there have with them this Writ and then and there show cause why peti-

tioner should not be released from further custody and detention.

/s/ PETER J. SMITH,
Petitioner.

RUMMENS, GRIFFIN, SHORT
& CRESSMAN,
Attorneys for Petitioner.

United States of America,
State of Washington,
County of King—ss.

Peter J. Smith, being first duly sworn upon oath,
deposes and says:

That he is the Petitioner named in the foregoing
petition for Writ of Habeas Corpus; that he has
read the same, knows the contents thereof, and that
the same are true.

/s/ PETER J. SMITH.

Subscribed and sworn to before me this 9th day of
March, 1956.

[Seal] /s/ RICHARD REINERTSEN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed March 12, 1956.

[Title of District Court and Cause.]

No. 4105

ORDER TO SHOW CAUSE

This matter having come on before the undersigned judge for the above-entitled court, in open court, upon the petition of Peter J. Smith for a Writ of Habeas Corpus, and the court having read said petition, considered the same, and being fully advised in the premises, now therefore,

It Is Hereby Ordered that Rear Admiral A. M. Bledsoe, U.S. Navy, and Capt. J. J. Greytak, U.S. Navy, and Charles S. Thomas, Assistant Secretary of Defense for the Navy, or any other person or persons who may be temporarily acting on their behalf, be and they hereby are ordered to appear before the undersigned judge of the above-entitled court, at his courtroom, in the United States Court House, in the City of Seattle, County of King, State of Washington, at the hour of 2:00 p.m. on Monday, the 2nd day of April, 1956, and to then and there show cause, if any there be, why the prayer of Peter J. Smith should not be granted.

Done in Open Court this 12th day of March, 1956.

/s/ WILLIAM J. LINDBERG,
Judge.

Presented by:

/s/ KENNETH P. SHORT,

RUMMENS, GRIFFIN, SHORT

& CRESSMAN,

Attorneys for Petitioner.

[Endorsed]: Filed March 12, 1956.

[Title of District Court and Cause.]

Nos. 4101 and 4105

STIPULATION FOR AND ORDER OF
CONSOLIDATION FOR HEARING

It Is Stipulated by and between counsel for petitioner Boscola, relator Smith and respondents Rear Admiral A. M. Bledsoe, et al., that the above-titled causes, reasonably believed to involve the same general issues at law, may be consolidated for hearing.

/s/ CHARLES P. MORIARTY,

United States Attorney;

/s/ EDWARD J. McCORMICK, JR.,

Assistant United States Attorney, Counsel for Respondents, Bledsoe, et al., and Thomas, et al.

DAY & WESTLAND,

By /s/ ROBERT S. DAY,

Counsel for Petitioner, Louis
V. Boscola.

RUMMENS, GRIFFIN, SHORT
& CRESSMAN,

By /s/ KENNETH P. SHORT,

Counsel for Relator Peter J.
Smith.

So Ordered.

Done in Open Court this 27th day of March, 1956.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

[Endorsed]: Filed March 28, 1956.

[Title of District Court and Cause.]

Nos. 4101 and 4105

RETURN TO ORDER TO SHOW CAUSE ON
PETITION FOR A WRIT OF HABEAS
CORPUS

Respondents A. M. Bledsoe, Rear Admiral, U.S. Navy, and J. J. Greytak, Captain, U.S. Navy, make the following return to the order to show cause herein and states:

I.

Respondents deny generally the averments of petitioners herein except as hereinbelow specifically admitted.

II.

Petitioners were ordered to active duty in the United States Navy on or about January 31, 1956,

pursuant to authority of the Secretary of the Navy set forth in letter orders Ser 112-167 and Ser 112-168, dated January 25, 1956, copies of which are submitted to this court by stipulation of counsel and are hereby made a part of this return as fully as if set forth at length herein.

III.

The Secretary of the Navy is empowered to order petitioners to active duty pursuant to authority contained in 34 USC 433. A national emergency exists.

IV.

Petitioners are lawfully on active duty and are restrained of their liberty in no other way by any respondent before this court.

For the foregoing reasons, respondents pray the orders to show cause be quashed and the petitions dismissed.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ EDWARD J. McCORMICK, JR.,
Assistant U.S. Attorney,
Counsel for Respondents.

State of Washington,
County of King—ss.

A. M. Bledsoe, Rear Admiral, United States Navy, being first duly sworn on oath, deposes and says that he is one of the respondents in each of the above-

named causes, that he has read the foregoing return and that he believes the contents of same to be true.

/s/ ALBERT M. BLEDSOE,
Rear Admiral, U. S. Navy.

Subscribed and sworn to before me this 30th day of March, 1956.

[Seal] /s/ RICHARD REINERTSEN,
Notary Public in and for the State of Washington,
Residing at Mountlake Terrace.

[Endorsed]: Filed April 2, 1956.

[Title of District Court and Cause.]

Nos. 4101 and 4105

STIPULATION OF FACTS

It is stipulated by and between counsel for petitioner Boscola and relator Smith and repondents Rear Admiral Bledsoe and Captain Greytak that the following facts are true and may be so considered without further formal proof thereof.

Re: Louis V. Boscola, No. 4101

Louis V. Boscola, Chief Musician, United States Navy, enlisted in the United States Regular Army on June 9, 1915 and, through successive (although broken) enlistments, completed over thirty (30)

years' service in regular components (service after May 2, 1921, being in the United States Navy) on May 31, 1947, at which time he was placed on the retired list of the Regular Navy. Petitioner, in January, 1954, was charged with the crime of carnal knowledge on January 8, 1954, in Kitsap County, Washington. Petitioner pled guilty in January, 1954, and was sentenced to serve a term in the Washington State Penitentiary. Petitioner was released on parole to the supervision of the Washington State Board of Prison Terms and Paroles on January 31, 1956. Petitioner was ordered to active duty in the United States Navy pursuant to orders, copy of which is appended as Attachment 1, and is now on active duty at the Naval Receiving Station, Seattle, Washington (popularly known as Pier 91), under the direct command of respondent Greytak and the indirect commend of respondent Greytak's military superior, respondent Bledsoe.

On March 2, 1956, petitioner was, pursuant to UCMJ 35 (50 USC 606), served with a copy of the Charge and Specification alleging a violation of UCMJ 120 (50 USC 714). Such charge and Specification charges and is based upon the same act (to wit, carnal knowledge) as that for which petitioner was confined by the State of Washington.

This stipulation of facts is not exclusive and shall not be a bar to the introduction of any portion of Louis V. Boscola's service record, subject to the general rules as to admissibility of evidence.

Re: Peter J. Smith, No. 4105

Peter J. Smith, Chief Torpedoeman, United States Navy, enlisted in the United States Regular Navy on November 17, 1924, and through successive enlistments completed twenty-two (22) years, three (3) months, twenty-six (26) days service on December 15, 1946, at which time he was transferred to the Fleet Reserve of the Regular Navy. Petitioner was charged with the crime of manslaughter on May 23, 1952, in King County, Washington. Petitioner pled guilty in September, 1952, and was sentenced to serve a term in the Washington State Penitentiary. Petitioner thereafter completed thirty (30) years naval service and was transferred to the retired list of the United States Navy on September 1, 1954. Petitioner was released on parole to the supervision of the Washington State Board of Prison Terms and Paroles on January 31, 1956. Petitioner was ordered to active duty in the United States Navy pursuant to orders, copy of which is appended as Attachment 2, and is now on active duty at the Naval Receiving Station, Seattle, Washington, (popularly known as Pier 91), under the direct command of respondent Greytak and the indirect command of respondent Greytak's military superior, respondent Bledsoe.

On March 2, 1956, petitioner was, pursuant to UCMJ 35 (50 USC 606), served with a copy of the Charge and Specification alleging a violation of UCMJ 119 (50 USC 713). Such Charge and Specification charges and is based upon the same act (to

wit, manslaughter) as that for which petitioner was confined by the State of Washington.

This stipulation of facts is not exclusive and shall not be a bar to the introduction of any portion of Peter J. Smith's service record, subject to the general rules as to admissibility of evidence.

/s/ CHARLES P. MORIARTY,
United States Attorney;

/s/ EDWARD J. McCORMICK, JR.,
Assistant United States Attorney, Counsel for Re-
spondents, Bledsoe, et al., and Thomas, et al.

DAY & WESTLAND,

By /s/ ROBERT S. DAY,
Counsel for Petitioner, Louis
V. Boscola.

RUMMENS, GRIFFIN, SHORT
& CRESSMAN,

By /s/ R. M. OSWALD,
Counsel for Relator, Peter J.
Smith.

Attachment 1

Headquarters
Thirteenth Naval District
Seattle 99, Washington

Code 112

P16-4:bi

Ser 112-167

25 Jan 56

From: Commandant, Thirteenth Naval District.

To: Boscola, Louis Vincey, 214 30 88, MUC,
USN Retired; Inmate, Washington State
Penitentiary, Walla Walla, Washington.

Subj: Recall to active duty.

Ref: (a) SECNAV ltr JAG:I:2:EJB:cmr Bos-
cola Louis V. of 15 Sep 1954;
(b) BUPERS Manual, ART C-10330(1);
(c) JAG ltr JAG:I:2:WJM:bp of 11 Jan
1956;
(d) ART 2(4), UCMJ 1951;
(e) ART H-1805, BUPERS Manual.

1. In accordance with the authority contained in references (a), (b), (c) and (d), on or about 31 January, 1956, when released by the Warden, Washington State Penitentiary, Walla Walla, Washington, you are at such time, ordered to active duty in the U.S. Navy. You will report to the Guard who delivers these orders and from such time as these orders are delivered to you, you will consider yourself in an active duty status.

2. Upon reporting to the Guard as directed by paragraph 1 above, you will proceed in his custody immediately and report to the Commanding Officer, U.S. Naval Receiving Station, Seattle, Washington, for appropriate disposition and to await further orders and instructions from the Commandant, Thirteenth Naval District.

3. Upon reporting to the Commanding Officer, U.S. Naval Receiving Station, Seattle, Washington, you will further report to the Medical Officer, U.S. Naval Station, Building No. 61, Seattle, Washington, for a physical examination.

4. This active duty is with full pay and allowances and is chargeable to appropriation 1761453.16 MPN 1956, Expenditure Account Number, 71130. Travel is chargeable to appropriation 1761453.18, MPN 1956, Object Class 029, Expenditure Account 74132, Bureau Control and Activity Number 22/31600.

5. In connection with your active duty pay and allowances, the Commanding Officer, U.S. Naval Receiving Station, Seattle, Washington, by copy of these orders, is directed to forward the following items to the Officer-in-Charge, Naval Accounts Disbursing Officer, Thirteenth Naval District, Seattle 99, Washington:

(a) Original and 2 copies NAVSANDA Form 511 (Order to enter account);

(b) W-4 Form;

(c) NAVPERS 668 and NAVSANDA Form 545, if applicable;

(d) Original and 3 copies of the "Notice of Re-entrance into Active Military Service," required by reference (e), together with the original and 3 copies of these orders, complete with all endorsements.

S. H. AMBRUSTER,
By Direction.

Copy to:

SECNAV

JAG

BUPERS

NAVFINCEN CLEVE

CO RECSTA SEATTLE

MEDICAL OFFICER

Attachment 2

Headquarters
Thirteenth Naval District
Seattle 99, Washington

Code 112

P16-4:bi

Ser 112-168

25 Jan 1956

From: Commandant, Thirteenth Naval District.

To: Smith, Peter J., 371 59 27, TMTC, USN
Retired; Inmate, Washington State Peni-
tentiary, Walla Walla, Washington.

Subj: Recall to active duty.

Ref: (a) SECNAV ltr JAG:I:2:EBJ:dvs Smith, Peter J. of 10 Feb 1954;
(b) BUPERS Manual, ART C-10330(1);
(c) JAG ltr JAG:I:2:WJM:bp of 11 Jan 1956;
(d) ART 2(4) UCMJ 1951;
(e) ART H-1805, BUPERS Manual.

1. In accordance with the authority contained in references (a), (b), (c) and (d), on or about 31 January, 1956, when released by the Warden, Washington State Penitentiary, Walla Walla, Washington, you are at such time, ordered to active duty in the U.S. Navy. You will report to the Guard who delivers these orders and from such time as these orders are delivered to you, you will consider yourself in an active duty status.

2. Upon reporting to the Guard as directed by paragraph 1 above, you will proceed in his custody immediately and report to the Commanding Officer, U.S. Naval Receiving Station, Seattle, Washington, for appropriate disposition and to await further orders and instructions from the Commandant, Thirteenth Naval District.

3. Upon reporting to the Commanding Officer, U.S. Naval Receiving Station, Seattle, Washington, you will further report to the Medical Officer, U.S. Naval Station, Building No. 61, Seattle, Washington, for a physical examination.

4. This active duty is with full pay and allowances and is chargeable to appropriation 1761453.16, MPN 1956, Expenditure Account Number 71130.

Travel is chargeable to appropriation 1761453.18, MPN 1956, Object Class 029, Expenditure Account 74132, Bureau Control and Activity Number 22/31600.

5. In connection with your active duty pay and allowances, the Commanding Officer, U.S. Naval Receiving Station, Seattle, Washington, by copy of these orders, is directed to forward the following items to the Officer-in-Charge, Naval Accounts Disbursing Officer, Thirteenth Naval District, Seattle 99, Washington:

(a) Original and 2 copies NAVSANDA Form 511 (Order to enter account);

(b) W-4 Form;

(c) NAVPERS 668 and NAVSANDA Form 545, if applicable;

(d) Original and 3 copies of the "Notice of Re-entrance into Active Military Service," required by reference (e), together with the original and 3 copies of these orders, complete with all endorsements.

S. H. AMBRUSTER,

By Direction.

Copy to:

SECNAV

JAG

BUPERS

NAVFINCEN CLEVE

CO RECSTA SEATTLE

MEDICAL OFFICER

[Endorsed]: Filed April 10, 1956.

[Title of District Court and Cause.]

Nos. 4101 and 4105

MEMORANDUM OPINION

This matter is before the court after a hearing upon a return to an order to show cause why the prayer of petitioner should not be granted, which order was issued upon the filing of a petition for writ of Habeas corpus in each of the above cases. By stipulation the cases were consolidated for hearing, common questions of law and fact being present.

Both Boscola and Smith having completed thirty years in the Navy as enlisted men were retired under the provisions of Title 34 U.S.C.A. § 431. Both were prosecuted, pleaded guilty and were imprisoned in the Washington State Penitentiary for offenses committed several years after leaving active service in the Navy, Smith having been in the Fleet Reserve rather than on the retired list at the time of committing his offense. Boscola was charged with carnal knowledge and Smith with manslaughter.

Following conviction and imprisonment by the State of Washington the Navy concluded that both men should be ordered into active service under the provisions of 34 U.S.C.A. § 433 for the purpose of court-martial because of the serious nature of the offense in each case.

On the day they were released on parole from the Washington State Penitentiary each was met at the gate of the penitentiary by a Chief Petty Officer of

the Navy and served with orders recalling them to active duty and directing them to report to the guard delivering the orders and proceed in his custody to the United States Naval Receiving Station at Seattle, Washington, to await further orders. On March 7, 1956, each was ordered to restricted status, which status was defined in special instructions on the reverse side of their orders (See Exhibits 1 and 6), as follows:

“The Limits of Your Restriction Are Defined as Your Barracks and the Mess Hall of the Receiving Station Only.”

Boscola on March 7, 1956, and Smith on March 12, 1956, filed petitions for writs of habeas corpus alleging that each was being illegally restrained by the Navy and praying for release from further custody and detention.

Petitioners contend, first, that the Navy has no authority to recall them to active duty solely for the purpose of subjecting them to trial by general court-martial, and second, that the Navy does not have court-martial jurisdiction over a retired enlisted man for crimes such as allegedly committed by them several years after their separation from active service.

Respondents take the position with respect to petitioners' first contention that Boscola and Smith are on active duty in the United States Navy pursuant to competent orders, that the restraint upon their liberty is a moral restraint resulting from

obedience to orders rather than a physical restraint as would constitute custody sufficient to support a discharge under a writ of habeas corpus. In their return respondents allege in paragraph IV:

“Petitioners are lawfully on active duty and are restrained of their liberty in no other way by any respondent before this court.”

Their position as to custody apparently is based upon the case of *Wales v. Whitney*, 114 U. S. 564, which case still appears to be the law. However, before determining whether the facts as to restraint in the present cases are such as to make the rule announced in *Wales v. Whitney*, *supra*, applicable it would appear necessary to first decide whether petitioners have been lawfully called back to active duty by the Navy.

In their brief on this issue,

“Respondents concede that, if their orders to active duty be without authority, petitioners are entitled to release from active duty in the same sense that inductees (not lawfully inducted) or deportees (who are really entitled to be at liberty) are entitled to be released from the control of those who order their activities.”

At the time of hearing, while insisting that the fact was not material, respondents stipulated that the purpose of recalling the petitioners to active duty was for the purpose of court-martial. The facts, as they are disclosed from the written stipulation and copies of letter orders to active duty attached

thereto, as well as from the testimony of petitioners and the exhibits admitted in evidence do not disclose that petitioners were recalled for any particular duty or that any duty has been assigned them. Rather, the evidence as well as the lack thereof would tend to establish that petitioners were recalled ostensibly for active duty but in reality for no duty and actually to accomplish an undesirable discharge (Exhibit 4).

It is agreed that the authority, if it existed to order petitioners into active service is derived from 34 U.S.C.A. §433 (Mar. 3, 1915, c. 83, 38 Stat. 941; Aug. 29, 1916, c. 417, 39 Stat. 591), which provides:

“The Secretary of the Navy is authorized in time of war, or when a national emergency exists, to call any enlisted man on the retired list into active service for such duty as he may be able to perform. While so employed such enlisted men shall receive the pay and allowances authorized by section 26 of Title 37, except as otherwise provided in the next section.”

As the court understands respondents' contention it is that under said statute, in time of war or when a national emergency exists, the Secretary of the Navy is authorized to call any enlisted man on the retired list into active service without qualification. Assuming, without conceding that the national emergency declared by President Truman of December 16, 1950, is still in effect for the purposes of said statute, such an interpretation would in effect ignore

the words "for such duty as he may be able to perform." It is a general rule that the courts, in the interpretation of a statute, may not take, strike, or read anything out of a statute, or delete, subtract, or omit anything therefrom. Rather, effect should, if possible, be accorded to every word and phrase. 50 Am. Jur. §231. Hence, a construction will be avoided which would render a part of a statute superfluous, or which would give to a particular word or phrase a meaning that adds nothing to the statute. 50 Am. Jur. §359.

It follows that a plain and reasonable construction of the language used requires that some meaning be given the words "for such duty." Congress must have intended that an enlisted man on the retired list, if called to active service, would be called for the purpose of performing some duty. Can it be contended in good faith that awaiting trial by court-martial or making application for undesirable discharge because of an offense committed years after separation from active service and unrelated to the naval forces, activity or business, was a type or category of duty contemplated by Congress when the Secretary of Navy was authorized in time of war or national emergency to recall retired enlisted men into active service for such duty as they might be able to perform. The court believes not.

Respondents cite U. S. ex rel., *Pasela v. Fenno*, 167 F. 2d 593, in support of their position that petitioners could lawfully be recalled to active duty for purpose of courts-martial. It must be admitted that

the court's reasoning in the language used, namely, "Thus appellant could lawfully be recalled to active duty, nothing in the statute or legislative history indicating that a call to active duty solely for purposes of court-martial proceedings is not permissible," tends to sustain their contention. However, there the court was interpreting a different statute—34 U.S.C. §583c (1946 edition)—applicable to the Naval Reserve, which provided:

"Any member of the Naval Reserve, including those on the honorary retired list created by section 855h of this title, or who may have been retired, may be ordered to active duty by the Secretary of the Navy in time of war or when in the opinion of the President a national emergency exists and may be required to perform active duty throughout the war or until the national emergency ceases to exist; but in time of peace, except as otherwise provided in the Naval Reserve Act of 1938, he shall be ordered to or continued on active duty with his own consent only: Provided, That the Secretary of the Navy may release any member from active duty either in time of war or in time of peace. (June 25, 1938, ch. 690, title I, §5, 52 Stat. 1176; June 13, 1939, ch. 205, §12(d), 53 Stat. 821; June 24, 1941, ch. 233, §2, 55 Stat. 261; Aug. 4, 1942, ch. 547, §15(b), (d), (e), 56 Stat. 739.)"

It will be noted that the language applicable varies substantially from that used in 34 U.S.C.A.

§433, and permits of a varied interpretation. Further, while this court has the utmost respect for the authority and opinions of the Court of Appeals of the Second Circuit it appears that the reasoning followed in the language quoted is not compelling as applied to the statute and facts here involved. It should be noted further that in that case certiorari was granted by the Supreme Court and subsequently the review was dismissed by stipulation.

Respondents further contend that this court has no right to examine into the status of petitioners within the naval service, and cite as authority *U. S. ex rel., Orloff v. Willoughby*, 345 U. S. 83. In that case the petitioner admitted he was lawfully inducted into the Army but sought release because he had not been assigned to specialized duties nor given the commissioned rank to which he claimed to be entitled by the circumstances of his induction. Here we are concerned with the lawfulness of the recall to duty and not with an assignment to duty after lawful induction or recall. The *Orloff* decision, while concerned with an issue differing materially from that here involved would in certain of its language appear to challenge respondents' position rather than support it. The court there stated (page 88):

“To separate particular professional groups from the generality of the citizenship and render them liable to military service only because of their expert callings and, after induction, to divert them from the class of work for which they were conscripted would raise ques-

tions not only of bad faith but of unlawful discrimination. We agree that the statute should be interpreted to obligate the Army to classify specially inducted professional personnel for duty within the categories which rendered them liable to induction. It is not conceded, however, that particular duty orders within the general field are subject to judicial review by habeas corpus."

This language would seem to sustain the proposition that the Navy may not lawfully order or recall an enlisted man on the retired list to active duty under a statute clearly anticipating a recall for the performance of further duty as a guise for an unrelated purpose, namely, for the avowed and only purpose of obtaining his consent to an undesirable discharge wholly and completely from further duty or in the alternative to subject him to court-martial, presumably with the same objective.

It is the opinion of the court that under the evidence and applicable law in these cases the petitioners have been unlawfully called into active duty and are entitled to be released therefrom.

Having so concluded the issues involved in petitioners' second broad contention as to the court-martial jurisdiction of the Navy over retired enlisted men for offenses such as here involved under the Code of Military Justice, particularly 50 U.S.C.A. §552(4), are not reached. The respondents having taken the position, as they do in their return,

that petitioners are lawfully on active duty and are restrained of their liberty in no other way, it must be assumed that if petitioners' recall to active duty was unlawful respondents will impose no further restraint upon them in connection with any courts-martial proceedings now instituted and pending against them as disclosed by the record before this court.

The court for the reasons above set forth will sustain the writ and discharge the petitioners.

Dated May 1, 1956.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

[Endorsed]: Filed May 1, 1956.

[Title of District Court and Cause.]

No. 4101

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter having come on regularly before the above-entitled court, upon a return to an Order to Show Cause why the prayer of petitioner's Petition for Writ of Habeas Corpus should not be granted, and testimony having been introduced, and argument of counsel having been heard, Robert S. Day, of Day and Westland, appearing as attorney for petitioner Boscola, Edward J. McCormick, Jr., Assistant United States Attorney, and Joe J. Munster, Captain, United States Navy, appearing for re-

spondents Greytak and Bledsoe; and the court having considered the testimony, argument of counsel, briefs, and memoranda of authority presented by both parties, and all of the exhibits introduced into evidence, and being fully advised in the premises, now therefore makes and enters the following:

Findings of Fact

I.

That on May 29, 1946, petitioner Boscola completed thirty years of service in the United States Navy for pay purposes, and that on May 31, 1947, petitioner Boscola was released from active duty in the United States Navy and was placed on the retired list of the United States Navy. That at the time of his retirement, petitioner Boscola held the rank of Chief Musician.

II.

That subsequently, petitioner was charged with the crime of carnal knowledge in the Superior Court of the State of Washington, in and for Kitsap County, under Docket No. 33091, said crime allegedly having been committed on January 8, 1954. That petitioner entered a plea of guilty to said charge and was sentenced to a maximum of twenty years in the Washington State Penitentiary at Walla Walla, Washington. That on January 31, 1956, petitioner Boscola was released from the Washington State Penitentiary on parole.

III.

That on the same day, petitioner Boscola was met at the gate of the Washington State Penitentiary by a Chief Petty Officer of the United States Navy, and served with orders recalling him to active duty, and directing him to report to the guard delivering the orders and proceed in his custody to the United States Naval Receiving Station in Seattle, Washington, to await further orders.

IV.

That the written stipulation of facts and copies of letter orders to active duty attached thereto, as well as the testimony of petitioner and other exhibits admitted into evidence, show that petitioner was not recalled into active duty in the Navy for any particular duty, and that no duty has been assigned to petitioner since his recall to active duty. That the evidence establishes that petitioner Boscola was recalled ostensibly for active duty, but in reality for no duty, and actually to accomplish an undesirable discharge.

Done by the Court this 8th day of May, 1956.

/s/ WILLIAM J. LINDBERG,

Judge of the District Court.

From the foregoing Findings of Fact, the Court now makes and enters the following:

Conclusions of Law

That petitioner Boscola has been unlawfully called into active duty in the United States Navy, and is entitled to be released therefrom.

Done by the Court this 8th day of May, 1956.

/s/ WILLIAM J. LINDBERG,
Judge of the District Court.

Presented by:

DAY & WESTLAND,
Attorneys for Petitioner.

Approved as to form this 7th day of May, 1956.

/s/ EDWARD J. McCORMICK, JR.,
Attorney for Respondents.

Receipt of copy acknowledged.

[Endorsed]: Filed May 8, 1956.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 4101

UNITED STATES, ex rel., LOUIS v. BOSCOLA,

Petitioner,

vs.

REAR ADMIRAL A. M. BLEDSOE, U. S. Navy;
CAPT. J. J. GREYTAK, U. S. Navy; and
CHARLES S. THOMAS, Assistant Secretary
of Defense for the Navy,

Respondents.

ORDER SUSTAINING WRIT OF HABEAS
CORPUS AND ORDERING RELEASE OF
PETITIONER

This Matter having come on regularly before the
above-entitled court, upon a return to an Order to
Show Cause why a Writ of Habeas Corpus should
not be granted, and the court having previously
hereto entered Findings of Fact and Conclusions of
Law, now therefore,

It Is Hereby Ordered, Adjudged and Decreed that
the petition of Louis V. Boscola for a Writ of
Habeas Corpus should be and hereby is sustained,
and

It Is Further Ordered, Adjudged and Decreed
that respondents A. M. Bledsoe, Rear Admiral,
United States Navy, and J. J. Greytak, Captain,

United States Navy, shall forthwith release Louis v. Boscola from active duty in the United States Navy.

Done by the Court this 8th day of May, 1956.

/s/ WILLIAM J. LINDBERG,
Judge of the District Court.

Presented by:

DAY & WESTLAND,
Attorneys for Petitioner.

Approved as to form this 7th day of May, 1956.

/s/ EDWARD J. McCORMICK, JR.,
Attorney for Respondents.

Receipt of copy acknowledged.

[Endorsed]: Filed May 8, 1956.

[Title of District Court and Cause.]

No. 4105

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be It Remembered this matter came on duly and regularly for trial and was tried on April 12 and 13, 1956, before the undersigned Judge of the above-entitled court sitting without a jury upon the petition of relator Peter J. Smith for Writ of Habeas Corpus which was consolidated with a similar petition in that certain cause entitled "United States ex rel., Louis V. Boscola, Petitioner, vs. Rear Admiral

A. M. Bledsoe, U. S. Navy; Captain J. J. Greytak, U. S. Navy, and Charles S. Thomas, Assistant Secretary of Defense for the Navy, Respondents," being this court's cause No. 4101, relator Smith appearing in person and by Rummens, Griffin, Short & Cressman, his attorneys and the respondents appearing by Charles P. Moriarity, U. S. Attorney by Edward J. McCormick, Jr., Assistant U. S. Attorney, and Joe J. Munster, Captain, U. S. Navy, and the court having examined the records and files herein, the stipulation of facts on file herein, the testimony of witnesses and certain documentary evidence admitted and the oral stipulations of counsel in open court and having heard the arguments of respective counsel and having considered the briefs of respective counsel on file herein and having take the matter under advisement and on May 1, 1956, having filed a Memorandum Opinion herein directing the issuance of a Writ of Habeas Corpus herein and releasing and discharging petitioner from active duty, now in conformity therewith, this court does make the following

Findings of Fact

I.

In accordance with the written stipulation of facts on file herein the court finds that relator Peter J. Smith, Chief Torpedoeman, United States Navy, enlisted in the United States Regular Navy on November 17, 1924, and through successive enlistments completed twenty-two (22) years, three (3)

months, twenty-six (26) days service on December 15, 1946, at which time he was transferred to the Fleet Reserve of the Regular Navy. Petitioner was charged with the crime of manslaughter on May 23, 1952, in Kitsap County, Washington. Petitioner pled guilty in September, 1952, and was sentenced to serve a term in the Washington State Penitentiary. Petitioner thereafter completed thirty (30) years naval service and was transferred to the retired list of the United States Navy on September 1, 1954. Petitioner was released on parole to the supervision of the Washington State Board of Prison Terms and Paroles on January 31, 1956. Petitioner was ordered to active duty in the United States Navy, and is now on active duty at the Naval Receiving Station, Seattle, Washington (popularly known as Pier 91), under the direct command of respondent Greytak and the indirect command of respondent Greytak's military superior, respondent Bledsoe.

On March 2, 1956, petitioner was, pursuant to UCMJ 35 (50 U.S.C. 606), served with a copy of the Charge and Specification alleging a violation of UCMJ 119 (50 U.S.C. 713). Such Charge and Specification charges and is based upon the same act (to wit, manslaughter) as that for which petitioner was confined by the State of Washington.

II.

The court further finds that following conviction and imprisonment by the State of Washington the Navy concluded that both men should be ordered into active service under the provisions of 34

U.S.C.A. Sec. 433 for the purpose of court-martial because of the serious nature of the offense in each case.

On the day they were released on parole from the Washington State Penitentiary each was met at the gate of the penitentiary by a Chief Petty Officer of the Navy and served with orders recalling them to active duty and directing them to report to the guard delivering the orders and proceed in his custody to the United States Naval Receiving Station at Seattle, Washington, to await further orders. On March 7, 1956, each was ordered to restricted status, which status was defined in special instructions on the reverse side of their orders (See Exhibits 1 and 6), as follows:

“The Limits of Your Restriction Are Defined as Your Barracks and the Mess Hall of the Receiving Station Only.”

III.

From the oral stipulation of counsel in open court, the written stipulation above referred to together with its attachment and from the testimony of the petitioners and exhibits admitted in evidence the court finds that petitioners were not recalled for any particular duty and that no duty has been assigned them by respondents but that relator was recalled ostensibly for active duty but in reality for no duty and for the purpose of trial by court-martial for manslaughter committed May 23, 1952.

Done in Open Court this 8th day of May, 1956.

/s/ WILLIAM J. LINDBERG,
Judge.

From the foregoing Findings of Fact, the court does deduce the following

Conclusions of Law

I.

That this court is possessed of jurisdiction of the parties and subject matter of this action.

II.

Relator Peter J. Smith was unlawfully recalled into active duty by the United States Navy and is entitled to be released from active duty and further restraint imposed upon him by respondents.

Done in Open Court this 8th day of May, 1956.

/s/ WILLIAM J. LINDBERG,
Judge.

RUMMENS, GRIFFIN, SHORT
& CRESSMAN,
Attorneys for Relator.

Presented by:

/s/ KENNETH P. SHORT.

Approved as to form:

/s/ EDWARD J. McCORMICK, JR.,
Asst. U. S. Attorney.

[Endorsed]: Filed May 8, 1956.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 4105

UNITED STATES OF AMERICA on the Relation
of Peter P. Smith,

Relator,

vs.

CHARLES S. THOMAS, Assistant Secretary of
Defense for the Navy; A. M. BLEDSOE, Rear
Admiral, U. S. Navy, and J. J. GREYTAK,
Captain, U. S. Navy,

Respondents.

JUDGMENT

Be It Remembered this matter came on duly and regularly for trial and was tried on April 12 and 13, 1956, before the undersigned Judge of the above-entitled court sitting without a jury upon the petition of relator Peter J. Smith for Writ of Habeas Corpus which was consolidated with a similar petition in that certain cause entitled "United States ex rel., Louis V. Boscola, Petitioner, vs. Rear Admiral A. M. Bledsoe, U. S. Navy; Captain J. J. Greytak, U. S. Navy, and Charles S. Thomas, Assistant Secretary of Defense for the Navy, Respondents." being this court's cause No. 4101, relator Smith appearing in person and by Rummens, Griffin. Short & Cressman, his attorneys and the re-

spondents appearing by Charles P. Moriarity, U. S. Attorney by Edward J. McCormick, Jr., Assistant U. S. Attorney, and Joe J. Munster, Captain U. S. Navy, and the court having examined the records and files herein, the stipulation of facts on file herein, the testimony of witnesses and certain documentary evidence admitted and the oral stipulations of counsel in open court and having heard the arguments of respective counsel and having considered the briefs of respective counsel on file herein and having taken the matter under advisement and on May 1, 1956, having filed a Memorandum Opinion herein directing the issuance of a Writ of Habeas Corpus herein and discharging the petitioner from the custody of respondents, and having heretofore made, rendered and entered Findings of Fact and Conclusions of Law, it is by the court

Ordered, Adjudged and Decreed that the petition of relator Peter J. Smith for Writ of Habeas Corpus be and the same is hereby granted and respondents be and they hereby are directed to forthwith release and discharge said relator from any and all active duty status and further restraint.

Done in Open Court this 8th day of May, 1956.

/s/ WILLIAM J. LINDBERG,
Judge.

RUMMENS, GRIFFIN, SHORT
& CRESSMAN,
Attorneys for Relator.

Presented by:

/s/ KENNETH P. SHORT.

Approved as to form:

/s/ EDWARD J. McCORMICK, JR.,
Asst. U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed May 8, 1956.

[Title of District Court and Cause.]

No. 4101

NOTICE OF APPEAL

To: Louis V. Boscola, petitioner, and Day and Westland, Box 514, Kennewick, Washington, his attorneys, and the Clerk of the above-entitled Court.

Notice Is Hereby Given that Rear Admiral A. M. Bledsoe, et al., Respondents above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment ordering respondents to release petitioner from active duty in the United States Navy entered on May 8, 1956.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ EDWARD J. McCORMICK, JR.,
Asst. United States Attorney,
Attorneys for Respondents.

[Endorsed]: Filed July 3, 1956.

[Title of District Court and Cause.]

No. 4105

NOTICE OF APPEAL

To: Peter J. Smith, relator, and Rummens, Griffin, Short & Cressman, 1107 American Building, Seattle, Washington, his attorneys, and the Clerk of the above-entitled Court.

Notice Is Hereby Given that Charles S. Thomas, et al., Respondents above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment ordering respondents to release and discharge relator from any and all active duty status and further restraint entered on May 8, 1956.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ EDWARD J. McCORMICK, JR.,
Asst. United States Attorney,
Attorneys for Respondents.

[Endorsed]: Filed July 3, 1956.

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 4101

UNITED STATES, ex rel., LOUIS V. BOSCOLA,
Petitioner,

vs.

REAR ADMIRAL A. M. BLEDSOE, U. S. Navy,
CAPTAIN J. J. GREYTAK, U. S. Navy, and
CHARLES S. THOMAS, Assistant Secretary
of Defense for the Navy,

Respondents.

No. 4105

UNITED STATES OF AMERICA, on the Rela-
tion of PETER J. SMITH,

Relator,

vs.

CHARLES S. THOMAS, Assistant Secretary of
Defense for the Navy, A. M. BLEDSOE, Rear
Admiral, U. S. Navy, and J. J. GREYTAK,
Captain, U. S. Navy,

Respondents.

TRANSCRIPT OF PORTION
OF PROCEEDINGS

April 13, 1956

Before: Honorable William J. Lindberg,
United States District Judge.

Appearances:

ROBERTS S. DAY, of
DAY & WESTLAND,

Appeared for and on Behalf of Petitioner
Boscola.

KENNETH P. SHORT, and
TRACY E. GRIFFIN, of
RUMMENS, GRIFFIN, SHORT & CRESS-
MAN,

Appeared for and on Behalf of Relator
Smith.

EDWARD J. McCORMICK, JR.,

Assistant United States Attorney, West-
ern District of Washington.

JOE MUNSTER, JR.,

Captain, U. S. Navy,

Appeared for and on Behalf of Re-
spondents.

PROCEEDINGS

(Whereupon, testimony and other evidence having been offered and received, colloquy and argument having been had by and between respective counsel, the following proceedings were then had, to wit:)

The Court: I will give you a ten minute recess.

(Whereupon, at 10:40 o'clock, a.m., a recess was had until 10:51 o'clock, a.m., on the 13th day of April, 1956, at which time, Counsel and

Parties heretofore noted being present, the following proceedings were had, to wit:)

Mr. McCormick: If it please Court, we are prepared to cut the accordion concert and stipulate that the purpose of recalling the Petitioner to active duty was for the purpose of court-martial.

Counsel for Petitioner (Respondent) denies the materiality and, if your Honor admits the stipulation, we take exception.

The Court: As I understand, you deny the materiality or relevency of such a stipulation but, be it material or relevant, you do so stipulate?

Mr. McCormick: Yes, sir.

The Court: I think that covers it.

Reporter's Certificate

I, Earl V. Halvorson, Official Court Reporter for the United States District Court, for the Eastern and Western Districts of Washington, do hereby certify that the foregoing is a true and correct extract of proceedings had in the within-entitled and numbered causes on the date hereinbefore set forth; and I do further certify that the foregoing has been transcribed by me or under my direction.

/s/ EARL V. HALVORSON.

(Admitted April 12, 1956)

214 30 28 BOSCOLA, Louis Vine
 (SERVICE NUMBER) (LAST NAME) (FIRST NAME) (MIDDLE INITIAL)
 CMUS USN ☒ USN-1 ☐ USN-SV ☐ USNR ☐ USNR-SV ☒ RET.
 (RATING) (CLASS)

1. ACCEPTED FOR ENLISTMENT AT Bremerton, Wash. 2-27-40
 (PLACE) (DATE)
2. INDUCTED AT _____
 (PLACE) (DATE)
3. ORDERED TO ACTIVE DUTY FROM _____
 (PLACE) (DATE)
4. HOME SHOWN IN SERVICE RECORD _____
 (CITY AND STATE)

NOTE: USN and USNR enlisted for immediate active duty - use 1 above.

USN-1, USN-SV, USNR-SV - Use 2 and enter location of local draft board to which individual first reported for delivery to induction station.

USNR ordered from inactive duty - Use 3 and enter address to which orders to active duty were addressed.

ALL CLASSES - Use 4 in addition to others required, only when individual is entitled to transportation in kind to home of record.

5. COMPLETED 30 YEARS SERVICE FOR PAY PURPOSES ON 5-29-46
 (NO.) (DATE)
6. THE ABOVE NAMED INDIVIDUAL IS THIS DATE 31 May 1947
 (DATE)
- ☒ RELEASED FROM ACTIVE DUTY ☐ DISCHARGED WITH HON RAD
 (CHARACTER OF DISCHARGE)

7. REASON AND AUTHORITY

RAD

ALNav 453-46

Elect TA Bremerton, Wash. place accep
for enl.Service record forward to Comdt.,
THIRTEENTH Naval District. 5-31-47.

PLAINTIFF EXHIBIT

CAUSE

W. F. JOHNSON, CH. SH. ~~CH. SH.~~ USN

(NAME AND SIGNATURE)

ASST PERSONNEL

OFFICER (See Art. 2025 (2) N. R.)

U. S. NAVRECSTA., SEATTLE, WASH.

(NAME AND LOCATION OF ACTIVITY FROM WHICH SEPARATED)

PLAINTIFF'S EXHIBIT NO. 3

(Admitted April 12, 1956.)

JAG:I:2EJB:cmr

Boscola, Louis V.

15 Sep 1954

From: The Secretary of the Navy

To: Chief of Naval Personnel

Subj: Boscola, Louis Vincey, 214 30 88, Muc,
USN (Ret)

Ref: (a) Ltr Chief of NavPers to SecNav
(JAG), Pers-B221e-wc MM 214 30 88
of 19 August 1954

(b) BuPers Manual, Part C-10330(1)

(c) SecNavInst 5810.1 dtd 5 March 1953

1. Receipt of reference (a) requesting permission on behalf of Commandant Thirteenth Naval District, to try subject-named man by court-martial is acknowledged. In view of the serious nature of the offense it is considered that this case comes within the excepted class of cases referred to in reference (c) and, accordingly permission to try Boscola by court-martial is hereby granted.

2. While not essential, it is considered that recall to active duty as authorized by reference (b) is appropriate; however, the final decision as to this

aspect of the case is left to the administrative discretion of the Bureau of Naval Personnel.

J. H. SMITH, JR.,
Assistant Secretary of the
Navy for Air.

Copy to:
ComThirteen

PLAINTIFF'S EXHIBIT NO. 4

(Admitted April 12, 1956.)

Department of the Navy
Bureau of Naval Personnel
Washington 25, D. C.

Pers-B221b:mh

23 Sept 1954

From: Chief of Naval Personnel
To: Commandant Thirteenth Naval District
Subj: Boscola, Louis Vincey, 214 30 88, Muc.
USN (Ret), Procedure to be followed in
case of
Ref: (a) Com13 ltr ser 11B-1368 of 26 May 1954
(b) SecNavInst 5810.1
(c) SecNav ltr to CNP JAG:I:S:EJB:cmr
Boscola, Louis V. dtd 15 Sep 54
(d) Art. C-10330(1), BuPers Manual
(e) Uniform Code of Military Justice
(f) Art C-10312 BuPers Manual

Encl: (1) Sample copy of request for undesirable discharge.

1. Reference (a) reported that subject man was convicted by the Superior Court for the State of Washington in and for the County of Kitsap, on a charge of Carnal Knowledge, which involved sexual relations with his 13-year-old adopted daughter. Boscola was sentenced to the Washington State Penitentiary, Walla Walla, Washington, for a term of not more than twenty years.

2. It has been held that in the absence of express statutory authority a person in Boscola's category cannot be involuntarily discharged as undesirable by administrative action. In view of the serious nature of Boscola's offense the Secretary of the Navy considered that this case came within the excepted class of cases referred to in reference (b), and by reference (c), granted the Commandant Thirteenth Naval District, permission to try Boscola by General Court-Martial in order that the following procedures, as proposed by the Chief of Naval Personnel, may be instituted.

a. When eligible for release from prison, Boscola to be ordered to active duty pursuant to reference (d) and take into naval custody

b. Boscola to be confronted with charge and specification and warned of his rights in accordance with Art. 31 of reference (e).

c. Boscola to be informed that a signed request for undesirable discharge in lieu of trial by General

Court-Martial, similar to that set forth in enclosure (1), would probably receive favorable action.

d. If he submits such a signed request, Boscolo's discharge as undesirable by reason of misconduct is directed upon approval of the request by the Commandant Thirteenth Naval District, without further reference to the Chief of Naval Personnel. The discharge certificate shall cite this letter and the signed request as Authority for Discharge.

e. If Boscola does not submit such a signed request, proceedings to be instituted with a view to trying him by General Court-Martial.

3. It is requested that the applicable procedures outlined in paragraph 2 be instituted in Boscola's case and that the Chief of Naval Personnel (Attn Bers B221b) be advised of any action taken.

/s/ H. S. ROBERTS,
H. S. ROBERTS,
By Direction.

PLAINTIFF'S EXHIBIT NO. 5

U. S. Naval Station
Seattle, Washington

NS—Seattle

Ser: 2220-09:stj

14 February 1956

From: Commanding Officer

To: Commandant, Thirteenth Naval District
(Code 22)

Subj: Boscola, Louis V., 214 30 88, Chief musician, U. S. Navy (Retired); recommendation for trial by general court-martial in the case of

Ref: (a) Chapter VII, para 33(i), MCM, 1951
(b) Article 33, UCMJ
(c) SecNav Instruction 5813.1 dtd 15 Sept 1954
(d) BuPers ltr Pers B221b-mh dtd 23 Sept 1954

Encl: (1) Original service record in the case of Boscola
(2) Investigating Officer's report, DD Form 457, dtd 14 Feb 1956

1. In accordance with references (a) through (d), it is recommended that Boscola, Louis V., 214 30 88, chief musician, U. S. Navy (Retired) be brought to trial by general court-martial on the following charge: Violation of the Uniform Code of Military Justice, Article 120 (carnal knowledge), one specification.

2. In view of the serious nature of the charge in this case and the fact that it is an offense which comes within the excepted class of cases referred to in reference (c), it is recommended that trial by general court-martial be initiated.

3. In accordance with current instructions from ComThirteenth Boscola will be retained at this command pending trial.

J. J. GREYTAK.

PLAINTIFF'S EXHIBIT NO. 2

(Admitted April 12, 1956.)

29 September 1954

My dear Mr. Smith:

I take great pleasure in forwarding the attached letter from the Chief of Naval Personnel and in congratulating you on your completion of more than thirty years' honorable service. Your retirement has been richly earned and is well deserved.

My best wishes for many years of good health and happiness.

Sincerely,

A. M. BLEDSOE,

Rear Admiral, USN, Commandant Thirteenth Naval
District.

Encl.

Peter Jacobsen Smith, 371 59 27, TMTC, USN
(Ret), Box 29, Keyport, Washington.

Department of the Navy
Bureau of Naval Personnel
Washington 25, D. C.

in reply refer to

Pers-B221e-we

MM 371 59 27

18 August 1954

From: Chief of Naval Personnel

To: Commandant Thirteenth Naval District

Subj: Smith, Peter Jacobsen, 371 50 27, TMC
(f4D), USNFR

Ref: (a) ComThirteen ltr ser 22-463 of 14 Jun
1954

(b) CNP ltr Pers B221e-ew MM 371 59 27
Undtd to Com-13 (Mailed 25 March
1954)

1. The additional information forwarded by reference (a) in subject man's case together with the Commandant's recommendation in the premisis have been carefully reviewed.

2. In view of the serious nature of the offense of which subject man was convicted by the State of Washington authorities, it is considered that the maintenance of high standards for naval personnel, active or inactive, requires recourse to appropriate disciplinary measures in this case. Should Smith elect trial by general court-martial, however, the various favorable facts enumerated in reference (a) will of course be available to him as matters in extenuation or mitigation.

3. Compliance with the procedure outlined in reference (b) is accordingly requested.

/s/ J. C. DANIEL,

J. C. DANIEL,

Assistant Chief of Naval
Personnel.

Copy to:

JAG

ComNavBaseBrem

JAG:I:2:EJB:dvj

Smith, Peter J.

10 Feb 1954

From: The Secretary of the Navy

To: Chief of Naval Personnel

Subj: Smith, Peter Jacobsen, 371 59 27, CTM
(F4D) USNFR

Ref: (a) Ltr Chief of NavPers to SecNav
(JAG), Pers-B221e-BMC, MM 371 59
27, 19 Jan 1954

(b) Title 34, USC, §854d

(c) SecNavInst 5810.1 dtd 5 March 1954

1. Receipt of reference (a) requesting permission on behalf of Commandant, Thirteenth Naval District, to try subject-named man by general court-martial is acknowledged. In view of the serious nature of the offense it is considered that this case

comes within the excepted class of cases referred to in reference (c) and, accordingly, permission to try Smith by general court-martial is hereby granted.

2. While not essential, it is considered that recall to active duty as authorized by reference (b) is appropriate; however, the final decision as to this aspect of the case is left to the administrative discretion of the Bureau of Naval Personnel.

J. H. SMITH, JR.,

Assistant Secretary of the
Navy for Air.

Copy to:

Com13

[Title of District Court and Cause.]

No. 4101

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) FRCP, I am transmitting herewith the following original papers in the file dealing with the action, excluding exhibits, as the record on ap-

peal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Petition for Writ of Habeas Corpus, filed 3-7-56.
2. Petitioner's Memorandum of Points and Authorities, filed 3-7-56.
3. Order to Show Cause, filed 3-7-56.
4. Marshal's Return on Show Cause Order on USA, filed 3-13-56.
5. Notice of Appearance of Respondents, filed 3-22-56.
6. Letter, US Dept. Justice to Parsons, filed 3-22-56, re service.
7. Stipulation and Order for Consolidation with Cause No. 4105, filed 3-28-56.
8. Stipulation and Order that physical presence of Respondents in court will not be necessary, filed 3-28-56.
9. Return to Order to Show Cause, filed 4-2-56.
10. Affidavit of Service by Mail, filed 4-2-56.
11. Order Fixing Date for Filing Briefs and Final Argument, filed 4-2-56.
12. Respondents' Memorandum in Support of Motion to Quash Order to Show Cause and to Dismiss, filed 4-6-56.
13. Stipulation of Facts, filed 4-10-56.
14. Memorandum Opinion, filed 5-1-56.
15. Findings of Fact and Conclusions of Law, filed 5-8-56.
16. Order Sustaining Writ of Habeas Corpus and Ordering Release of Petitioner, filed 5-8-56.

17. Notice of Appeal, filed July 3, 1956.

18. Motion for Order Extending Time for Filing Record and docketing appeal, filed Aug. 9, 1956.

19. Court Reporter's Transcript of Portion of Proceedings had on April 13, 1956, filed Aug. 14, 1956.

20. Order for Transmittal of certain exhibits, filed Aug. 15, 1956. Petitioner's Exhibits 1, 3, 4 and 5.

21. Notice of Appeal.

Witness my hand and official seal at Seattle this 30th day of August, 1956.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy.

[Title of District Court and Cause.]

No. 4105

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivisin 1 of Rule 10 of the United

States Court of Appeals for the Ninth Circuit, and Rule 75(o) FRCP, I am transmitting herewith the following original papers in the file dealing with the action, excuding exhibits, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Petition for Writ of Habeas Corpus, filed 3-12-56.
2. Order to Show Cause, filed 3-12-56.
3. Marshal's Return on Order to Show Cause (Service on USA), filed 3-13-56.
4. Letter. Dept. Justice to Parsons, re service, filed 3-22-56.
5. Appearance of respondents, filed 3-26-56.
6. Brief and Memo. of Petitioner, filed 4-6-56.
7. Findings of Fact and Conclusions of Law, filed 5-8-56.
8. Judgment, filed May 8, 1956.
9. Notice of Appeal, filed 7-3-56.
10. Motion for Order Extending Time for Filing Record and docketing appeal. filed Aug. 9, 1956.
11. Relator's Exhibit 2.
12. Notice of Appeal.

Witness my hand and official seal at Seattle this 30th day of August, 1956.

[Seal]

MILLARD P. THOMAS.

Clerk.

By /s/ TRUMAN EGGER.

Chief Deputy.

[Endorsed]: No. 15226. United States Court of Appeals for the Ninth Circuit. Rear Admiral A. M. Bledsoe, U. S. Navy; Capt. J. J. Greytak, U. S. Navy, et al., Appellant, vs. United States, ex rel., Louis V. Boscola, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed and Docketed August 6, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Endorsed]: No. 15225. United States Court of Appeals for the Ninth Circuit. Charles S. Thomas, Assistant Secretary of Defense for the Navy, et al., Appellant, vs. United States of America on the relation of Peter J. Smith, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed and Docketed August 6, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 15225

CHARLES S. THOMAS, et al.,

Appellants,

vs.

UNITED STATES ex rel., PETER J. SMITH,

Appellee.

No. 15226

REAR ADMIRAL A. M. BLEDSOE, et al.,

Appellants,

vs.

UNITED STATES ex rel., LOUIS V. BOSCOLA,

Appellee.

STATEMENT OF POINTS RELIED UPON ON APPEAL

Come Now appellants in the above-entitled causes and furnish a list of points to be relied upon on appeal:

1. The District Judge erred in admitting over objection evidence concerning the reason for which petitioners were recalled to active duty .

2. The District Judge erred in finding that petitioners were recalled into the Navy for no duty.

3. The District Judge erred in finding that petitioners were not assigned to any duty.

4. The District Judge erred in finding that petitioners were recalled for the purpose of trial by court-martial, separation from the service, or accomplishment of a punitive discharge.

5. The District Judge erred in sustaining the Writ of Habeas Corpus and ordering petitioners released from active duty.

Dated this day of August, 1956.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ EDWARD J. McCORMICK, JR.,
Assistant United States Attorney, Counsel for Appellants, Charles S. Thomas, et al., Rear Admiral A. M. Bledsoe, et al.

By /s/ TRACY E. GRIFFIN,
DAY AND WESTLAND,
Counsel for Appellee, Boscola.

Receipt of copy acknowledged.

[Endorsed]: Filed August 18, 1956.

[Title of Court of Appeals and Cause.]

Nos. 15225 and 15226

STIPULATION FOR ORDER OF
CONSOLIDATION

It Is Stipulated by and between Charles P. Moriarty, United States Attorney for the Western District of Washington, and Edward J. McCormick, Jr., Assistant United States Attorney, counsel for appellants Charles S. Thomas, et al., and Rear Admiral A. M. Bledsoe, et al., and Rummins, Griffin, Short and Cressman, counsel for appellee United States ex rel., Peter J. Smith, and Day and Westland, counsel for appellee United States ex rel., Louis V. Boscola, that the two causes above titled may be consolidated for all purposes in the Court of Appeals, including but not limited to the Transcript of Record, briefs on behalf of all parties, hearings, arguments, stipulations and continuances for the reason that the causes arise from nearly identical facts, that the matters were consolidated for hearing in the trial court, a single memorandum decision was rendered by the trial court, and the alleged errors of law committed by the trial court were identical.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ EDWARD J. McCORMICK, JR.,
Assistant United States Attorney, Counsel for
Charles S. Thomas, et al., Counsel for Rear
Admiral A. M. Bledsoe, et al.

RUMMINS, GRIFFIN, SHORT
and CRESSMAN,

By /s/ TRACY E. GRIFFIN,
Counsel for Appellee, United States ex rel., Peter
J. Smith.

DAY AND WESTLAND,

By /s/ TRACY E. GRIFFIN,
Counsel for Appellee, United States ex rel., Louis
V. Boscola.

So Ordered this 20th day of August, 1956.

/s/ WILLIAM DENMAN,

/s/ HOMER T. BONE,

/s/ WILLIAM E. ORR,

United States Circuit Judges.

[Endorsed]: Filed August 21, 1956.

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

CHARLES S. THOMAS, Assistant Secretary of
Defense for the Navy, et al.,
Appellant,

vs.

UNITED STATES OF AMERICA on the Relation
of Peter J. Smith,
Appellee.

REAR ADMIRAL A. M. BLEDSOE, U. S. Navy;
CAPT J. J. GREYTAK, U. S. Navy, et al.,
Appellant,

vs.

UNITED STATES, ex rel LOUIS V. BOSCOLA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLANTS

CHARLES P. MORIARTY
United States Attorney
Western District of Washington

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Assistant United States Attorney

JOE H. MUNSTER
Captain, United States Navy
Attorneys for Appellants

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

CHARLES S. THOMAS, Assistant Secretary of
Defense for the Navy, et al.,
Appellant,

vs.

UNITED STATES OF AMERICA on the Relation
of Peter J. Smith,
Appellee.

REAR ADMIRAL A. M. BLEDSOE, U. S. Navy;
CAPT J. J. GREYTAK, U. S. Navy, et al.,
Appellant,

vs.

UNITED STATES, ex rel LOUIS V. BOSCOLA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLANTS

CHARLES P. MORIARTY
United States Attorney
Western District of Washington

EDWARD J. McCORMICK, JR.
Assistant United States Attorney

JOE H. MUNSTER
Captain, United States Navy
Attorneys for Appellants

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

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IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

CHARLES S. THOMAS, Assistant Secretary of
Defense for the Navy, et al.,
Appellant,
vs.

UNITED STATES OF AMERICA on the Relation
of Peter J. Smith,
Appellee.

REAR ADMIRAL A. M. BLEDSOE, U. S. Navy;
CAPT J. J. GREYTAK, U. S. Navy, et al.,
Appellant,
vs.

UNITED STATES, ex rel LOUIS V. BOSCOLA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLANTS

JURISDICTION

Jurisdiction lay in the District Court under 28
U.S.C. 2241 and lies in this Court under 28 U.S.C.
1291.

STATEMENT OF THE CASE

Insofar as this appeal is concerned, the operative facts in the court below are identical. Appellees Boscola and Smith were both, on all pertinent dates, *retired* enlisted men of the *regular* United States Navy. While the District Judge's decision made no point of it, it should be clearly understood that neither was (immediately prior to the significant events) on active duty, neither was nor ever had been a reservist as the term is commonly used to indicate a non-regular, non-career member of the armed forces, and both were entitled to and were drawing such retired pay as was pertinent to their rank and retired status. At a time before the events giving rise to this appeal, appellees committed separate crimes against the State of Washington and after judicial proceedings were incarcerated in the penitentiary. Appellees were called to active duty to effect their court-martial (appellants specifically do not concede that such call to active service was necessary to make petitioners amenable to court-martial), on January 31, 1956, by the Secretary of the Navy under 34 U.S.C. 433 and proceeded to a naval station at Seattle, Washington, where they were situated when this action commenced.

Appellees promptly sought their release from military jurisdiction by way of habeas corpus, alleg-

ing *inter alia* that they were not amenable to the impending court-martial, that trial by court-martial would subject them to double jeopardy, and a number of other averments not here material.

Hearings were had and evidence was offered. From the multiple averments of appellees, the District Judge considered only that contention that appellees had been unlawfully (*i.e.*, without authority of law) ordered to active duty. Appellants having conceded that *if* appellees were unlawfully in active service they were being restrained of their liberty insofar as they were compelled by military orders to remain at a fixed point, obey orders, etc., the District Judge sustained the writ and ordered appellees released from active duty (R. 41; R. 47).

QUESTIONS ON APPEAL

Appellants contend that:

I

The District Judge had no right to take evidence on the purpose for which appellees were ordered to active duty.

II

If the District Judge had a right to take evidence on the purpose for which appellees were ordered to

active duty, he erred in his construction of the terms "active duty", "active service", and "duty".

ARGUMENT AND AUTHORITIES

I

The District Judge had no right to take evidence on the purpose for which appellees were ordered to active duty.

The matter of recalling appellees to active duty being one of executive discretion, the District Judge had no power to review same or to inquire into its motivation.

In *Dakota Telephone Co. v. South Dakota*, 250 U. S. 163, 63 L.Ed. 910, 39 S.Ct. 507 (1919), at 184 the Supreme Court passed upon an exercise of "war power" by the President and said, "... indeed, the contention goes further and assails the motives which it is asserted induced the exercise of the power. But as the contention at best concerns not a want of power, but ... abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. ... as this court has often pointed out, the judicial may not invade the ... executive ... to correct alleged mistakes or wrongs arising from asserted abuse of discretion."

It is apparent from the Memorandum Opinion, especially R. 32 *et seq*, that the District Judge distinguished *U. S. ex rel Pasela v. Fenno* (C.A. - 2d; 1948), 167 F. 2d 593, on the ground that there a statute authorizing recall by the Secretary of the Navy without qualification of the power was involved while in the instant case he found a limitation on the *carte blanche* in the words "for such duty [etc.]" and therefore felt called upon to inquire into the motives and duty contemplated. Appellants feel that a similar *carte blanche* exists in 34 U.S.C. 433 and the District Judge erred in finding a justiciable limitation. If appellants be correct and there was full administrative discretion, the District Court had no jurisdiction to review it.

Applicable law on January 31, 1956, concerning the recall of retired enlisted persons of the Regular Navy was contained in the Act of March 3, 1915, as amended by the Act of August 29, 1916, codified as 34 U.S.C. 433 and read, in part, as follows:

"The Secretary of the Navy is authorized . . . when a national emergency exists, to call any enlisted man on the retired list into active service for such duty as he may be able to perform. [pay, etc.]"

In the instant case it was conceded that the Secretary of the Navy had called appellees to active duty; that appellees were retired enlisted men; and the Dis-

strict Judge assumed “without conceding” (R. 31, line 27) that a national emergency existed. It was stipulated by appellants (R. 52) that “. . . the purpose of recalling the Petitioner[s] to active duty was for the purpose of court-martial” but its relevancy and materiality was denied. (The words “accordion concert” at R. 52 should read “Gordian knot” but the error was discovered too late.)

But appellants maintained at the hearing in the court below and continue to maintain that the District Court, if the power to recall reposed in the Secretary of the Navy, had no right to examine the motives which prompted the orders or the duty contemplated. We must assume that the District Judge intended to limit his decision to the *motive* for he so said in his Memorandum Opinion (R. 34, line 18), “Here we are concerned with the lawfulness of the recall to duty and not with an assignment to duty after lawful induction or recall” and again (R. 35, line 11) “. . . the Navy may not lawfully order . . . to active duty under a statute clearly anticipating a recall for the performance of further duty as a guise for an unrelated purpose [court-martial] . . .” Similarly, the Findings of Fact re Boscola (R. 38, line 14) “. . . show that petitioner was not recalled . . . for any particular duty . . . was recalled ostensibly for active duty, but in reality for no duty, and actually to ac-

comply with an undesirable discharge." Findings re Smith (R. 44, line 23) contain essentially the same recitals.

Being confronted then squarely with a question of motivation, we deny the propriety of the District Judge's inquiry into the motive of the Executive branch. The *Dakota* case, *supra*, would appear to be authority squarely *contra*.

We must, however, determine whether the Secretary of the Navy really has *carte blanche* in this matter or whether the words "for such duty [etc.]" impose some limitation falling short of complete discretion.

The case of *Denby v. Berry*, 263 U. S. 29, 68 L.Ed. 148, 44 S.Ct. 74 (1923), would appear to be squarely in point here. In that case, the question arose as to the propriety of judicial review of the discretion of the Secretary of the Navy in ordering a Naval Reserve officer to inactive status under the Act of August 29, 1916, 39 Stat. 556. The Supreme Court in construing that law said at p. 33:

"It is quite evident from the foregoing that members of this [naval reserve] force occupied two statuses, one that of inactive duty, and the other of active service. It is further clear that it was within the power of . . . the Secretary of the Navy . . . to change . . . from one status to the other. . . . How this should be done, was within

the discretion of the . . . Secretary. . . . Orders [changing status] . . . were clearly within the power of the . . . Secretary of the Navy . . . [34] Nowhere is there found any limitation upon the discretion of the Executive in this regard. . . . [36] Because the Secretary gave [cf. had] a wrong reason for his action is not a ground for requiring him . . . to revoke the order . . . if he had discretion to do this [change status], as we have found he did have."

In citing *Denby*, we assume that we shall be met by the same objection as that raised in the Memorandum Opinion, to wit: that the *Denby* law gave unqualified discretion to the Secretary and that 34 U.S.C. 433 does not. We contend that the *Denby* statute and 34 U.S.C. 433 are essentially the same and to be construed *pari ratione* and in support we examine the matter historically.

Before the Act of March 3, 1915, 38 Stat. 928, there was, apparently, no method of augmenting the enlisted naval forces by other means than new enlistments. There were no enlisted reservists of any type as we now know them. Enlisted persons who served thirty years were retired and owed no further obligation while those who served less than thirty were simply separated. Regardless of how they left the Navy, their training was lost unless they returned to the colors voluntarily.

The Act of March 3, 1915, was an appropriation bill and covered 38 Stat. 928 - 953. At page 940 (third full paragraph) the Act said "There is hereby established a United States naval reserve . . ." and approximately one and one-half pages outlined such. Important was the provision that it be composed of former service men (*i.e.*, former regulars — NOT week-end warriors as we know a naval reservist primarily today) and it further provided at page 940 (fourth full paragraph) "Enlistments . . . [barred] unless he be found to be physically fit to perform the duties of the rating in which last discharged . . ."

There were provisions at page 941 for war service, "In time of war they may be required to perform active service with the Navy . . ." From the quoted section concerning physical qualifications, it may be presumed that such persons would be qualified for general duty without restriction or would have been separated from the reserve.

Immediately following these provisions concerning the naval reserve was a provision on page 941 (sixth full paragraph) which read, "The Secretary . . . call any enlisted man on the retired list into active service for such duty as he may be able to perform."

When read in context, the reason for the phrase "for such duty as he may be able to perform" to which

the District Judge adverted so markedly in his Memorandum Opinion (R. 31 - 32) becomes apparent. The reservist as described above was, by law, either physically qualified for general duty or he would not have been a reservist. The retired person, on the other hand, might have been so retired because he had completed thirty years service *or even because he was physically disabled*. In either case, he would remain on the retired rolls until death. Further physical disability or a continuation of that for which he was retired would not remove him therefrom. The phrase "for such duty as he may be able to perform" must have been intended solely to protect the rights of the United States to recall these men even though they might be capable of only limited service — not to require the United States to assign them to duty. Read in context it becomes clear that no limitation on the Navy was intended but the sole intention of Congress was to render retired personnel liable to recall in time of war despite the fact that they might not be fully qualified physically.

If we are to speculate as to what Congress intended when passing the Act of March 3, 1915, as the court did (R. 32, line 12 *et seq*), how much more reasonable is the foregoing explanation. Why should Congress have committed the redundancy of saying that retired persons might be ordered to "active service" for "duty" and omitted such redundancy as to reservists?

Can it be said that Congress meant to limit the Secretary's discretion as to retired people and allow him a free hand as to reservists? Yet the reasoning of the Memorandum Opinion would force us to such a preposterous conclusion. Herein lies the fallacy of interpreting code sections removed from context.

The Act of March 3, 1915, was followed by the Act of August 29, 1916, which was the law construed in *Denby, supra*. This, too, was an appropriation act encompassing 39 Stat. 556 - 619. Pages 587 - 600 were devoted to establishment of the "Naval Reserve Force" and went into much more detail than the act of the previous year. Provision was made in this law for the various "civilian" reserves as we now know them and the former-regular reserve was continued. At page 591 (second full paragraph) the provision for recall of retired enlisted men was repeated in identical words except that authority in time of "national emergency" was added. Appellants submit what must be plain, *i.e.*, that Congress changed nothing except to expand the time when the Secretary's power might be invoked. If then no limitation on discretion was intended in the Act of 1915, such absolute discretion continued in the Act of 1916 and was a part of the same law construed by the Supreme Court in *Denby, supra*.

To support further the view that the discretion is absolute we cite the only history of the Act of 1915 which we have discovered, the House Committee on Naval Affairs Report 1287, 63rd Congress, 3rd Session, January 16, 1915:

“Provision is made for the calling of enlisted men on the retired list into the active service in time of war. Existing laws provide for the retirement of enlisted men after 30 years service, but make no provision for their active employment in time of war, as in the case of officers placed on the retired list of the Navy.”

Reading this report, scant as it may be, reveals nothing but an affirmative intent on the part of Congress to authorize a control by the Navy, hitherto non-existent, over retired enlisted men — not an intention to limit such power.

While admittedly hindsight is of little value in construing a law, it should be noted that the Act of August 10, 1956, 70A Statutes at Large codified the tremendous bulk of existing military law. *It made no new law* (Senate Report No. 2484, 84th Congress, 2nd Session, p. 19).

10 U.S.C. 6482, 70A Stat. 417 replaces 34 U.S.C. 433 and reads:

“In time of war or national emergency the Secretary of the Navy may order to active duty any

retired enlisted member of the Regular Navy . . .”

The omission of the words “for such duty as he may be able to perform” is explained on page 497 of the cited report:

“The words ‘for such service [duty] as he may be able to perform’ are *omitted as surplusage* [i.s.] . . .”

For whatever value the opinion of the recent Congress may have, it is apparent that it attached no such significance to the words as did the District Court.

Appellants submit that Congress in the Act of 1915 intended to confer absolute discretion upon the Secretary of the Navy. The legislative history, examination of the text of the statutes, and the *Denby* case prove this assertion. That being the case, the *Dakota* case, *supra* is authority for the rule that such action and its underlying motive is beyond judicial review.

For other cases holding that military discretion will not be reviewed by the courts we cite the following:

a. *Nordmann v. Woodring* (D.C.-Okla.; 1939), 28 F. Supp. 573 at 574—“This court has no power to review the orders of the commanding officer of the Army unless Congress vested the court with such power.”

b. *Ainsworth v. Barn Ballroom Co., Inc.* (C.A.-4th; 1946), 157 F. 2d 97—The Fourth Circuit reversed the Eastern District of Virginia which had enjoined an armed forces commander from posting “off limits” sentries before a dancehall. The court cited *Dakota, supra* and said at 100: “If the order was within the discretionary authority of the heads of the War and Navy Departments . . . as has been pointed out time and again, the courts may not invade the executive departments to correct alleged mistakes arising out of abuse of discretion.”

c. *Harper v. Jones* (C.A.-10th; 1952), 195 F. 2d 705—Action to enjoin a military commander from placing an auto dealer “off limits” under authority which permitted him to place establishments off limits “for the purpose of maintaining discipline and to safeguard the health and welfare of military personnel”. The actual reason for the off limits order was the belief that the auto dealer had cheated a member of the command and had refused to comply with an order to refund “or else”. The District Court enjoined (98 F. Supp. 460) stating that the order was not for discipline, health and welfare. The Court of Appeals reversed stating at 707, “What is necessary for the discipline of military personnel and to safeguard their health and welfare is to be determined by the commanding officers and not the courts.” The action of this

Court of Appeals makes it clear that the courts will not examine the motives if the power exists.

d. *U. S. v. Litchfield* (D.C.-Me.; 1956), 144 F. Supp. 437—Action by U. S. to recover alleged over-payments. Defendant had been ordered to “active duty” instead of “training duty” in order that he might qualify for certain benefits. He became ill and was hospitalized and paid for a long period of time. U. S. sued to recover salary payments over and above those which would have been authorized under “training duty” on the ground that it was *intended* that his active duty should be co-terminal in point of time with the “training duty” which might have been ordered. The District Court in denying recovery said (at 440), “Hence, where an order, such as the one in question, is patently valid, it is the opinion of this Court that it does not have the power to review the motives and unexpressed intentions of the superior officer regarding that order. [cases] Whatever may have been his motives and intentions in directing the defendant to active duty, as distinguished from active training duty, are, therefore, immaterial to this action.”

In concluding this portion of our brief we still feel that the reasoning of the Second Circuit in *U. S. ex rel Pasela v. Fenno* (C.A.-2d; 1948), 167 F. 2d 593, is highly persuasive. The recall for court-martial in

that case was under an unqualified reserve statute and the court said, at 594: "Thus appellant could lawfully be recalled to active duty, nothing in the statute or legislative history indicating that a call to active duty solely for purposes of court-martial proceedings is not permissible."

We feel that the statute in this case is likewise unqualified insofar as it may have been construed to impose a limitation on the Secretary's power. That being the case, the orders to active duty to appellees were an exercise of executive discretion and not open to review by the court.

II

If the District Judge had a right to take evidence on the purpose for which appellees were ordered to active duty, he erred in his construction of the terms "active duty", "active service", and "duty".

It would appear from the Memorandum Opinion (R. 32, lines 14 - 27; R. 35, lines 10 - 19) that the District Judge, to put it succinctly, does not consider that awaiting court-martial is "performing duty" or "duty". He adheres to this belief while quoting (R. 33) the *Pasela* statute which said (line 16) "may be required to perform active duty" but finds that this language "varies substantially" (line 31) from "such duty as he may be able to perform." We cannot agree.

We feel that if Pasela was "perform[ing] active duty" while awaiting court-martial and undergoing such (and the Second Circuit apparently so felt), then Boscola and Smith were rendering "such duty as [they] may be able to perform" while awaiting court-martial.

The crux of the matter, of course, is the definition of "duty". As is said in *Litchfield, supra* at 439: "Because the consequences of active duty differ vastly from active or inactive training duty, the terms designating the type of duty are employed *with precision, as words of art* [*i.s.*], in the statutes, regulations and military orders." Appellants do not feel that the District Court construed the term "duty" as a word of art and erred in that respect. The petition of Boscola (R. 3 - 8) does not raise the point at all. The petition of Smith (R. 10 - 14) raises the point only in a general way (R. 13, lines 3 - 5). It was only in the Memorandum Opinion (R. 32, line 12 *et seq*) after all arguments were concluded that its importance became apparent. No opportunity existed to inform the District Judge as to what the armed forces meant by "duty".

It may be stated as almost a legal truism that "The practical interpretation of an ambiguous or uncertain statute by the executive department charged

with its administration or enforcement is entitled to the highest respect from the courts, especially when long-continued and uniform. . . ." 42 *Am. Jur.* "Public Administrative Law", § 78, page 392 - 3. The footnote citations in support of this proposition number literally hundreds and leave little to choose between. Be it enough to say that they all indorse the general proposition, but none are specifically in point.

While the District Judge's approach is negative, *i.e.*, that Boscola and Smith were not performing duty, we feel that a fair inference from his Opinion and Findings (R. 38; R. 44) is that the Judge feels that a status of doing something affirmative rather than waiting would be performing duty. The armed forces approach to the matter has always been, "They also serve who only stand and wait." Examples of such interpretation follow.

a. Opinions of the Judge Advocate General of the Navy, No. 85, April 30, 1952—An officer on active duty was restricted to his base and was killed in an auto accident off the base. *Held*, not in line of duty since "restriction constituted a specific duty assignment."

b. Bureau of Naval Personnel Manual, Article 5409—Requires that transfer orders to a brig (jail) or retraining command show *inter alia* "NATURE OF

DUTY” as “(number) days confinement at (name of confining activity).”

c. Winthrop, *Military Law and Precedents*, 1920, page 614—“What is military duty. The term ‘duty’ . . . means of course military duty. But — it is important to note — every duty which an officer or soldier is legally required by superior military authority, to execute, and for the proper execution of which he is answerable to such authority is necessarily a military duty . . .”

Scant as the foregoing references may be, we feel that they demonstrate that the armed forces interpretation of “duty” means simply being in service and doing as one is told, be it much or little. Especially pertinent is “a”, *supra* wherein the Navy held that “restriction”, a status very similar to that of Boscola and Smith, was “a specific duty assignment.”

We turn next to statutory definitions by Congress. They are admittedly specialized but we can find no better.

a. Act of May 4, 1948, 62 Stat. 208—An act to reimburse persons in the Navy for privately procured medical expenses if (1) no government facilities were available, and (2) “the person receiving the service is in a duty status.” Section 3 of the act provides

“For the purpose of this Act, a person . . . in a duty status . . . while on authorized liberty or leave.”

If the Congress felt, although admittedly for this statute, that leave was a duty status, surely being at a naval station available for orders (whether to appear before a court-martial or something else) is “duty”.

b. Act of July 9, 1952, 66 Stat. 481—Defines “duty” (for reservists) as “military service of *any nature* [*i.s.*] under orders or authorization issued by competent authority.”

Under this act, the mere status of being alive and under military control (“of any nature”) constitutes “duty” insofar as Congress is concerned. A more far-reaching definition could scarcely be imagined and as long as Boscola and Smith were alive and did as they were told under military direction, they performed duty.

Lastly we turn to the courts for the times they have construed the term “duty”. While the Tort Claims Act uses the phrase “in line of duty” we have found no assistance in such cases, primarily, we believe, because they are concerned with the rights of third parties. We have, however, found the following:

a. *U. S. v. Williamson*, 90 U. S. 411, 23 L.Ed.

89 (1874) is very nearly in point and we shall analyze it at length.

Captain Williamson sued for his full pay and the United States defended under a statute which provided, "That any officer absent from duty with leave [inapplicable exceptions] shall . . . receive . . . half . . . pay" Plaintiff, at the close of the Civil War when many officers were surplus, elected to be ordered to ". . . proceed to his home and await orders . . .", presumably until a vacancy became available. The position of defendant United States was that he was "absent from duty with leave" and did not fall within the exceptions.

The Supreme Court held for plaintiff saying (at 415):

"While absent from duty 'with leave,' the officer is at liberty to go where he will [etc.] . . . The obligations of an officer directed to proceed to a place specified, there to await orders, are quite different. It is his duty to go to that place and to remain at that place. He cannot go elsewhere; he cannot return until ordered. He is as much under orders, and can no more question the duty of obedience than if ordered to [fight, march, etc.] . . . [416] The power to make this assignment was a portion of the executive authority . . . [plaintiff] was not only justified in obeying this order, but it was his duty to obey it. It was his duty to proceed at once to his home, there to remain, subject to orders to be communicated to him."

It is clear from this opinion that the Supreme Court felt that Captain Williamson was "on duty" or "performing duty" although he was doing nothing except holding himself available for orders. A closer analogy to Boscola and Smith could scarcely be imagined.

b. *Rabinowitz v. U. S.* (C.A.-3rd; 1932), 60 F. 2d 458—Action to recover medical expenses paid by a soldier under a statute (at 459) "When . . . on duty where there is no officer, he * * * may arrange for the required service." The soldier was on detached service where there was no military station and returned to his home in a different city each night. He became ill at home and incurred medical expenses. The United States defended alleging plaintiff was "off duty" when ill. The court held (at 460), "If Rabinowitz had been taken ill in barracks . . . he unquestionably would have been considered 'on duty' during his illness."

Again we note a court opinion holding that "on duty" is not synonymous with "doing something".

c. *Terry v. U. S.* (Ct. Cl. - 1951), 97 F. Supp. 804—Action to recover pay. Defended by United States on ground that, while hospitalized, plaintiff had been placed on and used up "terminal leave" and therefore had been paid in full for duty and leave time leav-

ing no balance owing. The court granted judgment for plaintiff, saying (at 807) "This court held in 1904 that if an officer or soldier was subject to the orders of superior authority, whether [he] did *much or little or any duty* [i.s.] . . . then [he] was not on furlough [leave]. . . . The only inference possible . . . is that an officer . . . is on duty in the sense that he is under immediate supervision, may be called upon to perform such work as he is able, must wear prescribed garments, may leave the hospital only with the permission of the commanding officer, and is subject to the orders and discipline of the hospital staff."

Eliminating the references to hospitalization, this is almost exactly the situation in which Boscola and Smith were placed.

We conclude therefore that, if the District Judge was authorized to determine the duty status of appellees, he erred in concluding that a military person who is doing no specific work assignment but who is on active duty and subject to orders, is not "performing duty".

CONCLUSION

For the foregoing reasons appellants respectfully submit that these cases should be remanded to the District Court with directions to dismiss the writs and to order appellees to return to the active duty status from which the judgments of the District Court relieved them.

Respectfully submitted,

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**United States Court of Appeals
For the Ninth Circuit**

CHARLES S. THOMAS, Assistant Secretary of Defense for
the Navy, *et al.*, *Appellants*,

vs.

UNITED STATES OF AMERICA on the Relation of Peter J.
Smith, *Appellee*.

REAR ADMIRAL A. M. BLEDSOE, U. S. Navy; CAPT. J. J.
GREYTAK, U. S. Navy, *et al.*, *Appellants*,

vs.

UNITED STATES, ex rel. LOUIS V. BOSCOLA, *Appellee*.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

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United States Court of Appeals

For the Ninth Circuit

CHARLES S. THOMAS, Assistant Secretary
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Appellants,

vs.

UNITED STATES OF AMERICA on the Rela-
tion of Peter J. Smith,

Appellee.

No. 15225

REAR ADMIRAL A. M. BLEDSOE, U. S. Navy;
CAPT. J. J. GREYTAK, U. S. Navy, *et al.*,

Appellants,

vs.

UNITED STATES, ex rel. LOUIS V. BOSCOLA,
Appellee.

No. 15226

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEES

STATEMENT OF THE CASE

As appellants point out in their brief, both appellees, Boscola and Smith, were at the time of their recall to active duty on January 31, 1956, retired enlisted men from the United States Navy. Each had served more than 30 years in the armed forces. Boscola, after his retirement, and Smith, before his retirement but while on inactive duty, each committed crimes in the State of Washington. Each pleaded guilty and was sentenced according to law. Smith's 30 years in the Navy expired

after his incarceration in the State Penitentiary, and he was retired from the Navy while serving his sentence. Both men were paroled in January, 1956, and were recalled to active duty by the U.S. Navy for the avowed purpose of court-martialing them for the same crimes for which they had been tried, convicted and served their sentences. Both Smith and Boscola filed Petitions for Writs of Habeas Corpus, alleging that their recall to active duty was unlawful and that they, as retired enlisted men, were not subject to court-martial for crimes committed subsequent to retirement and in no way connected with naval duty. The cases were consolidated for hearing. After a full hearing, the court found in its memorandum decision:

“Can it be contended in good faith that awaiting trial by court-martial or making application for undesirable discharge because of an offense committed years after separation from active service and unrelated to the naval forces, activity or business, was a type or category of duty, contemplated by Congress when the Secretary of Navy was authorized in time of war or national emergency to recall retired enlisted men into active service for such duty as they might be able to perform. The court believes not.” (Tr.32)

“... the Navy may not lawfully order or recall an enlisted man on the retired list to active duty under a statute clearly anticipating a recall for the performance of further duty as a guise for an unrelated purpose, namely, for the avowed and only purpose of obtaining his consent to an undesirable discharge wholly and completely from further duty or in the alternative to subject him to court-martial, presumably with the same objective.” (Tr. 35)

ARGUMENT ON APPELLANTS' BRIEF

Appellees at the outset call the court's attention to the failure of appellants to comply with Rule 18(d) of Rules of the United States Court of Appeals for the Ninth Circuit. Appellants, in their brief, pages 3 and 4, under Questions on Appeal, urge error in the admission of evidence at the trial and have failed to quote the grounds urged at the trial for the objection and the full substance of the evidence admitted or rejected. Thus, although appellants urge that the District Court had no right to take evidence on the purpose for which appellees were recalled to active duty, there is nothing in the transcript of the proceedings to show that any objection whatever was made to the admission of Exhibit 4 (Tr. 56-58), Exhibit 5 (Tr. 58-60), or Exhibit 2 (Tr. 60-63). The purpose of the recall is a matter of stipulation (Tr. 52).

Appellants have further failed to comply with Rule 18(d) of Rules of the United States Court of Appeals for the Ninth Circuit by their failure to take any specification of error to the Findings of Fact and Conclusions of Law made by the court in regard to each of the appellees (Tr. 36-39 and 41-45).

In the *Boscola* case, the court made and entered Finding of Fact IV:

“That the written stipulation of facts and copies of letter orders to active duty attached thereto, as well as the testimony of petitioner and other exhibits admitted into evidence, show that petitioner was not recalled into active duty in the Navy for any particular duty, and that no duty has been assigned to petitioner since his recall to active duty. That the evidence establishes that petitioner Bos-

cola was recalled ostensibly for active duty, but in reality for no duty, and actually to accomplish an undesirable discharge.” (Tr. 38)

and made substantially the same Finding in the Smith case (Tr. 44, Finding of Fact III), both based upon testimony, evidence and stipulations of counsel. These Findings are now conclusive on appeal upon appellants’ failure to particularly state the error relied upon in appellants’ specification of errors.

For the reasons stated above, based upon appellants’ failure to comply with Rule 18(d) of this court, no consideration should be given to appellants’ Questions on Appeal I, appellants’ brief, page 3.

ANSWER TO APPELLANTS’ ARGUMENT

Appellants’ principal argument on appeal appears to be that, based upon *Dakota Telephone Co. v. South Dakota*, 250 U.S. 163, 63 L.ed. 910, 39 S.Ct. 507, the District Court was foreclosed from making any ruling whatever as to whether appellees had or had not been unlawfully recalled to active duty.

It may be stated as a maxim on appeals that propositions not raised in the trial court nor brought to its attention can not be raised for the first time on appeal. *Becker Steel Co. of America*, 296 U.S. 74, 56 S.Ct. 15; *Duigman v. U. S.*, 247 U.S. 195, 47 S.Ct. 566, 71 L.ed. 996. See 4 C.J.S., Appeal and Error, §228, page 430, and cases cited thereunder.

Appellants’ contention that appellees’ recall to active duty was a matter of administrative discretion and not subject to judicial review was never at any stage of the proceedings presented to the trial court and has been

raised for the first time in appellant's brief. There is no reviewable issue before this court, and the judgment of the District Court should be affirmed.

Appellants have taken the further side position that the trial court, having no power of judicial review in respect to appellees' recall to active duty, erred in admitting evidence as to the purpose for which appellees were so recalled. As stated earlier in this brief wherein appellants' failure to comply with Rule 18(d) is discussed, no objection to the admission of any such evidence is shown in the record. To preserve questions for review on appeal, objections must be made in the trial court. *Solomon v. Benjamin*, 75 F.(2d) 564, cert. denied 295 U.S. 749, 55 S.Ct. 831, 79 L.ed. 1694. Thus, having failed to take timely and proper objection to the admission of evidence as to the purpose of appellees' recall to duty, appellants now, for the first time, contend that the trial court erred in admitting such evidence upon the specific ground that the trial court had no power of judicial review of the administrative action of the Secretary of the Navy.

The only objection to the introduction of any evidence shown in the transcript is Mr. McCormick's objection to the admission of his oral stipulation (that the purpose of recalling appellees to active duty was for the purpose of court-martial) and his exception thereto (Tr. 52). This stipulation and objection was taken April 13, 1956 (Tr. 51), by which time all of the appellees' exhibits had been admitted as of April 12, 1956 (Tr. 53-63). No objection of appellants to the admission of these exhibits is shown in the record on appeal.

Turning, however, to the merits of appellants' arguments, it is appellees' contention that none of the cases cited by appellants in support of their contentions is factually or legally in point. The *Dakota* case, *supra*, was a case involving the power of the President of the United States to take over certain communications systems under a Joint Resolution (40 Stat. 904, C. 154), and as stated by appellant, the Supreme Court, in ruling upon whether the power had been validly exercised, stated that the action of the President was not subject to judicial review.

Thus, the case is one involving the war powers of the President in taking over and exercising control of a communications system, and is concerned in no way with the present case either factually or legally. It will be observed that the *Dakota* case is not a habeas corpus proceeding and in no way involved the personal liberty and restraint upon the person involved in the case at bar. There is a vast difference (politically as well as legally) between the *Dakota* case and the present case, which involves the recall of two retired enlisted men to active duty, during a time of limited National Emergency, for a purpose connected in no way with that National Emergency.

Appellants also cite *U. S. ex rel. Pasela v. Fenno*, 167 F.(2d) 593, as supporting their contention that appellees' recall to duty was legal. It is respectfully pointed out, however, that that case involved a member of the Fleet Reserve who had been convicted by court-martial of theft of military property while a civilian employee of the Navy Department. The Court of Appeals

for the Second Circuit found that the petitioner was subject to court-martial as a member of the Fleet Reserve on inactive duty, and refused to grant a writ. The court then went on to say *by way of dictum* that petitioner's recall to active duty for the purpose of court-martial had been proper. This, however, was by then a moot question, since the fact of being or not being on active duty at the time of court-martial was immaterial to the court-martial jurisdiction of the Navy under the applicable law.

Denby v. Berry, 263 U.S. 29, 44 S.Ct. 74, 68 L.ed. 148, cited by appellants in support of their contention that no judicial review can be had of a discretionary administrative act, is likewise not in point. There, the question involved was in regard to the ordering of a Naval Reserve Officer to inactive status and the court stated:

“It is quite evident from the foregoing that members of this [Naval Reserve] force occupied two statuses, one that of inactive duty and the other of active service. . . .”

The court then went on to say that the Secretary of the Navy had the power to transfer from one status to another and no judicial review of such action was possible.

The case at bar, however, involves two *retired enlisted men*, who were not merely on inactive duty. There is a vast difference between changing from an active to an inactive duty status within the active reserve and changing from a retired status to active duty.

Appellants make much of their contention that the District Court and appellees are impeaching the “mo-

tives" of the Navy in this action. Appellees are not interested, nor was the trial court, in the Navy's motives but rather in the *purpose* for which the recall to active duty was had. This aspect of the case will be developed more fully later in this brief.

Although the appellants have cited the *Pasela* case, *supra*, as authority for the proposition that recall to active duty for purposes of court-martial is permissible, appellants have failed to cite *U. S. v. Warden or Keeper of Naval Prison*, 265 Fed. 787. The question there presented, as stated by the court, was :

"Can an enlisted man in the United States Naval Reserve Forces be tried by a Navy court-martial for an offense alleged to have been committed while in active service, and be amenable to court-martial after he has been released from actual service and entered civil life ; no charges or specifications having been preferred against him prior to his release from active service?"

The court, after answering this question in the negative, further states :

"The United States Naval authorities had no jurisdiction over the relator, and he can only be recalled into the service in accordance with the rules and regulations of the Navy, and not for the purpose of giving the Navy court-martial jurisdiction."

See also : *U. S. v. MacDonald*, 265 Fed. 695.

No purpose would be served in this brief by dealing in detail with cases cited by appellants defining "duty," "service," and "active duty," although attention is called to Winthrop, *Military Law and Precedents*, 1920, page 614, cited by appellants in their brief at page 19,

which states, "What is military duty. The term 'duty' . . . means, of course, *military duty* . . . " Thus appellants in this phase of their argument apparently urge the court that court-martial is a duty, and that recall for such purpose is proper. Appellees feel that this entire line of appellants' argument based upon what appellees did or did not do after recall to active duty, has no bearing on whether the recall itself was lawful. Appellants' position is that petitioners were lawfully recalled to active duty, since after their *arrest*, they were subject to military orders and therefore on duty. This "duty," of course, consisted of (1) attempted coercion of appellees to sign requests for undesirable discharge (Tr. 57-58) and (2) restriction to barracks awaiting court-martial (Tr. 44). Thus, appellants contend appellees were lawfully recalled to active duty because *after* recall, they performed "duty" of a sort.

The question involved is whether the recall to active duty was lawful *at the time it was effected*.

ARGUMENT IN SUPPORT OF THE JUDGMENT

At the outset we point out to the court that there are no rules of *stare decisis* governing the case here on appeal, involving, as it does, the power of the Navy to recall *retired enlisted men* to active duty solely for purposes of court-martial. There are no decisions on the question and it is before the court as a case of first impression, and must be decided upon application of basic legal principles to the statute involved, rather than upon settled case law.

Appellees feel, as did the trial court, that the language of 34 U.S.C.A. §433,

“The Secretary of the Navy is authorized in time of war, or when a National Emergency exists, to call any enlisted man on the retired list into active service for such duty as he may be able to perform . . .”

must be given a common sense meaning, and effect should be given to every word therein. It seems obvious to appellees that Congress, in passing this law, meant to give the Secretary of the Navy authority to recall retired enlisted men into active duty to perform such services as able *in support of the war or emergency effort*. Clearly, the decision as to what duty is in aid of the National Emergency is an administrative one, not a judicial one. Here, however, it affirmatively appears that the recall was for no duty related to the emergency.

Appellees feel it can reasonably be assumed that retired men were not to be recalled for a purpose totally unconnected with any military effort. It is fundamental that the Navy's only function is a military one, and that any man called into active service can reasonably be expected to be on duty for that purpose. However, it is uncontradicted, and was stipulated, that the sole reason for recalling appellees to active duty was for a purpose totally unrelated to any military effort, *i.e.*, for the sole purpose of standing for court-martial.

Although the question is not directly in point on this appeal, the trial court not having reached the exact issue, it should be pointed out that the appellants' recalling of appellees for the sole purpose of court-martial raises the issue as to whether the Navy has court-martial jurisdiction of appellees. There is a very serious question as to whether or not appellees are subject to

court-martial, and that being the case, it has definite bearing on the question of their recall to active duty.

The Navy contended, and apparently still contends, that it has court-martial jurisdiction of appellees under the provisions of Article 2(4), Uniform Code of Military Justice, 50 U.S.C.A. §552(4), which states, in that portion of the statute relative to the case on appeal, as follows:

“The following persons are subject to this chapter . . .

“(4) Retired personnel of a regular component of the armed forces who are entitled to receive pay; . . . ”

At first glance there would seem to be no doubt that appellees are subject to the code, and therefore amenable to court-martial. However, a closer examination of the statute and its legislative history leads to the inevitable conclusion that the quoted section applies only to retired *officers*. There is no distinction in the statute itself of the terms “retired personnel” or of “regular component.”

The legislative history of the Uniform Code of Military Justice, Article 2(4), reveals that it was not the legislative intent to bring retired *enlisted* men under the provisions of that section. In examining the legislative history, we find that Mr. Robert W. Smith, professional staff member of Sub-Committee No. 1 of the House Committee on Armed Forces stated to that Sub-Committee:

“Paragraphs (4) and (5) have their sources in 10 U.S.C., Section 1023, and 34 U.S.C., Sections

389 and 853 d. The power of the Navy over retired reserves has been reduced.”

An examination of the indicated sections of the United States Code reveals that 10 U.S.C. §1023 pertains to rights and liabilities of retired *officers*. 34 U.S.C. §389 refers to the grades and status of retired *officers*; and 34 U.S.C. §853-d refers to reserves and fleet reserves, but does not pertain to *retired* members of the fleet reserve or to retired *regulars*. Thus, it is clear that Article 2(4), U.C.M.J., was based upon pre-existing legislation referring solely to officers and that the Sub-Committee had no intention to include retired enlisted men within the purview of the article. This appears even more clearly when the colloquy which took place between Mr. Brooks, Chairman of the Sub-Committee, and Mr. Felix Larkin, Assistant General Counsel of the Secretary of Defense, who assisted in drafting the Uniform Code, is examined. That colloquy is as follows:

“MR. BROOKS: Colonel Maas suggested that subsection 4, as I recall, was wrong.

“MR. LARKIN: I recall that Mr. Chairman. That is a provision we have not changed by modification; extension or by diminishing it in any way from the present law that has been on the books for I don’t know how many years.

“It covers, of course, the retired personnel of the regular components, the *officers* who are in a retired status and still considered to be officers of the United States or the Armed Forces.” House Hearing, page 864. (Emphasis added)

Mr. Larkin also stated in regard to Article 2(4) U.C.M.J.:

“As I say, that is the first time I had heard a criticism of that article which as far as we are concerned, is a pure reincorporation of what has been on the books for many years.” House Hearing, pages 864, 865.

At the time Mr. Larkin was speaking, retired *enlisted* personnel were not subject to the jurisdiction of either the Articles of War or the Articles for the Government of the Navy. In this regard see:

Murphy v. U. S., 38 Ct. Cls. 511, and 39 Ct. Cls. 178;

Court-Martial Orders, 9, 1922, 11;

Court-Martial Orders, 60, 1920, 22;

16 Op. J.A.G. 136, File 7657-123, Dec. 29, 1911.

In *Deming v. McClaughy*, 113 Fed. Cas. 639, Judge Sanborn of the Circuit Court of Appeals of the Eighth Circuit stated:

“The legal presumption is that courts of general jurisdiction have the power and authority to make the adjudications which they render, and that their judgments are valid. But no such presumption accompanies the sentences of courts of inferior or limited jurisdiction. It is indispensable to the maintenance of their judgments that this jurisdiction shall be clearly and unequivocally shown. A court-martial is a court of limited jurisdiction. It is a creature of the statute, a temporal judicial body authorized to exist by acts of Congress under specified circumstances for a specific purpose. It has no power or jurisdiction which the statutes do not confer upon it.”

It has often been said that courts-martial,

“ . . . are in fact simply instrumentalities of the executive power, provided by Congress for the

president as Commander-in-Chief, to aid him in properly commanding the Army and Navy and enforcing discipline therein." Winthrop, *Military Law and Precedents*, 1920 reprint, page 49, and that

" . . . trial of soldiers to maintain discipline is merely incidental to an Army's primary fighting function." *U. S. ex rel. Toth v. Quarles*, 350 U.S. 11, 76 S.Ct. 1, 100 L.ed. 8.

The court should inquire whether Congress, in enacting Article 2(4), U.C.M.J., considered that the discipline of the armed forces as a fighting force required the granting of jurisdiction over retired enlisted personnel *not on active duty*. Retired enlisted personnel owe no more service to the Navy than do members of the ready reserve (who by Art. 2(3), U.C.M.J., are not subject to the act except voluntarily) or retired members of the reserve (who by Art. 2(5), U.C.M.J., are subject to the act only when hospitalized). If the pre-existing law was not to be extended by Article 2(4), then the drafters of the code obviously had no intention of making it applicable to retired enlisted personnel. The Armed Forces representative, Mr. Felix Larkin, as much as said so when he referred (*supra*) to the "retired personnel of the regular components, the officers . . ."

The Congressional Committee was given to understand Article 2(4) was expressive of the existing law. It is clear that the House Sub-Committee understood such to be the meaning since Mr. Brooks, Chairman, said with reference thereto:

" . . . and furthermore, it is part of the present law, is it not, and has worked all right, has it not?"

Then if there is no objection, we would like to include that." *Legs. History*, p. 1262, see also p. 1261. Likewise, both the House and Senate Committee Reports state that:

"Paragraph (4) retains existing jurisdiction over retired personnel of a regular component who are entitled to receive pay." House Report, p. 10, Senate Report, p. 7.

Appellees point out to the court that 10 U.S.C.A. 1023 (referring to retired Army officers) specifically states that such retired officers shall be subject to trial by courts-martial.

"Officers retired from active service shall be entitled to wear the uniform of the rank on which they may be retired. They shall continue to be borne on the Army Register, and shall be subject to the rules and articles of war, and to trial by general court-martial for any breach thereof." 10 U.S.C.A. §1023.

Appellees point out to the court that 10 U.S.C.A. 1023 1951, 34 U.S.C.A. §389 (referring to retired Navy Officers) provided:

"Except as otherwise provided in this title, officers retired from active service shall be placed on the retired list of officers of the grades to which they belonged respectively at the time of their retirement, and continue to be borne on the Navy Register. They shall be entitled to wear the uniform of their respective grades, and shall be subject to the rules and articles for the government of the Navy and to trial by general court martial. The names of officers wholly retired from the service shall be omitted from the Navy Register."

At the time of the passage of the U.C.M.J., on May 5,

1950, the above section was amended by striking therefrom the words "and shall be subject to the rules and articles for the government of the Navy and to trial by general court-martial," which indicates that Congress considered those words superfluous in view of the considered meaning of Article 2(4).

Thus, for the above reasons, it is appellees' contention that Article 2(4), insofar as the Navy seeks to make it applicable to retired *enlisted* personnel, is an attempt at an unwarranted and unnecessary extension of military power. The position of the Navy and military authorities in this respect is particularly reprehensible in that, having led the Congressional Committees to believe enlisted men were not included within the provisions of Article 2(4), and having allayed the fears and circumvented the opposition which would most naturally arise to such an unwarranted extension of military jurisdiction, the Navy must now contend that the article clearly includes retired enlisted men.

Thus it appears to appellees that from the foregoing that the Navy has no jurisdiction to effectuate its avowed purpose in recalling the appellees to active duty, and that the appellants are in the position of recalling appellees for the obvious reason that the Navy feels that having appellees on active duty is in aid of jurisdiction, in that there being a serious issue as to the court-martial jurisdiction, that obtaining jurisdiction of the persons of appellees bolsters the jurisdiction in court-martial.

Apparently, appellants make no contention that court-martial itself is within the meaning of "active

service," although, as has been pointed out previously in this brief, appellants contend that awaiting court-martial is "active duty." Appellees fully expect, however, that appellants will, in argument and their reply brief, urge that the court-martial of appellees bears some reasonable relation to the maintenance of good order and discipline in the Navy. This contention was dealt with in the recent Supreme Court decision of *U. S. ex rel. Toth v. Quarles*, 350 U.S. 11, 76 S.Ct. 1, 100 L.ed. 8. Justice Black, speaking for the court, stated:

"We find nothing in the history or constitutional treatment of a military tribunal which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty, or property. Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be

removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals."

It is seen that the Supreme Court placed great emphasis on the the function of the military as being primarily a fighting unit and only secondarily a tryer of cases. The court then further states:

"It is impossible to think that the discipline of the army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians. And we are not impressed by the fact that some other countries which do not have our Bill of Rights indulge in the practice of subjecting civilians who were once soldiers to trials by courts-martial instead of trials by civilian courts.

"There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our constitution. Free countries of the world have tried to restrict military tribunals to *the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service*. . . . Consequently considerations of discipline provide no excuse for new *expansion* of court-martial jurisdiction at the expense of the normal and constitutionally preferred system of trial by jury. (Emphasis added)

"Determining the scope of the constitutional power of Congress to authorize trial by court-mar-

tial presents another instance calling for limitation to '*the least possible power adequate to the end proposed.*' "

Observe that in the *Toth* case, the court concerns itself with whether Toth should be tried in a civilian or a military court. Boscola and Smith have already been tried, convicted, sentenced, and served their terms in the penitentiary for the offenses committed. Appellants seek to now try them again in the name of "National Emergency."

Appellees contend that the Navy has no jurisdiction to accomplish its purpose of subjecting appellees to court-martial under U.C.M.J., Article 2(4), in that it does not apply to retired *enlisted* men, and that if the court should find that Article 2(4) does apply to retired enlisted men, that it should be declared unconstitutional under Article III, Sec. 2 of the United States Constitution and under the 5th and 6th Amendments thereto.

CONCLUSION

In conclusion, appellees reiterate that the action of appellants constitute an unwarranted and unnecessary attempt to extend the court-martial power of the military, and that the Navy's recall of appellees to active duty for the admitted purpose of subjecting them again to trial for an offense for which they have already been punished is not within the powers granted to the Secretary of the Navy. The reason for appellees' recall to duty lay not in aid of any National Emergency, but in aid of jurisdiction, and in an attempt to strengthen the Navy's jurisdiction by having appellees on active duty at the time of court-martial.

That from the legislative history of Article 2(4) U.C.M.J., it appears without question that appellees, as retired enlisted men, are not subject to court-martial, and that not only was the recall to active duty unlawful, but also the stated purpose was likewise unlawful.

That because of appellants' failure to comply with the rules of this court on appeal, there is no reviewable issue before the court, and the judgment of the District Court should be affirmed in all respects.

Respectfully submitted,

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United States
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FILED

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PAUL P. O'BRIEN, CL

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NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

REPLY BRIEF OF APPELLANTS

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REPLY BRIEF OF APPELLANTS

**APPELLANTS' ALLEGED FAILURE TO COMPLY
WITH RULE 18, 2(d)**

While appellants must concede that there has not been as full a compliance with Rule 18, 2 (d) for the Court of Appeals for the Ninth Circuit as might be

desired, they are not prepared to concede that there has been no compliance at all. By way of confession and avoidance, appellants can only say that it was their intention to place before the Court of Appeals in as succinct a form as possible the legal points involved without surplus verbiage. It may be that they have been misled in the direction of brevity by following previous records filed in the Court of Appeals and it is noted that in other cases, while finding a non-compliance with the rules, the Court has nevertheless considered the errors complained of. Appellants feel that a clear issue is presented to the Court and respectfully request that the Court pass thereon in the interest of clarifying the law on the points involved.

Appellants have (although not in the specification of error on Appellants' Brief, page 3) set forth both the "full substance of the evidence admitted" and the "grounds of the objections urged at the trial" in the verbatim account of proceedings on page 52 of the Transcript of Record. It is appellants' contention that the erroneous admission of the oral stipulation (R. 52) formed the *sole* basis for the Court's finding and conclusion appealed from. The Court's Memorandum Opinion (R. 30, line 25) reveals that "At the time of hearing, while insisting that the fact was not material, respondents stipulated that the purpose of recalling

petitioners [appellees] to active duty was for the purpose of court martial." The Court then remarks that "... the written stipulation . . . as well as . . . the testimony of petitioners [appellees] and the exhibits admitted in evidence do not disclose that petitioners [appellees] were recalled for any particular duty or that any duty has been assigned them." It should be carefully noted that the Court is remarking on what it failed to find from the exhibits, testimony, etc. It is only when the complained of stipulation was introduced that the Court had a basis for its finding. Appellees' own brief (p. 3, line 17) states "The purpose of the recall is a matter of stipulation (R. 52)."

If the erroneously admitted oral stipulation formed the sole basis for the Court's finding and conclusion, then appellants have set everything before the Court of Appeals necessary to a determination in this matter although admittedly in not the most desirable form. Objection to the exhibits (although such actually was made — see *infra*) was not necessary. That such stipulation did form the sole basis of the Court's decision will be discussed *infra*.

Appellants are quite frankly surprised at appellees' contention that (a) appellants erred in not printing a record showing objection to appellees' exhibits, and (b) arguing in support of the judgment based

upon such exhibits. Appellees were absolutely entitled under Rule 17 to have any portion of the record printed which they deemed proper and appellants neither raised (nor could raise) any objection to the printing of the exhibits. It is one thing, however, for appellees to have a portion of the record printed and quite another for them to argue that such printed portion supports the judgment when it was neither offered for nor received for the use which the trial court made of it.

Appellees in the course of the hearing offered certain exhibits which are reproduced (R. 53-63). It is a truism of the law that evidence offered must pertain to an issue in the pleadings. It is likewise a well-known rule that evidence may be admissible for one purpose, and that alone, being inadmissible for other purposes. See Wigmore, *Evidence*, Third Edition, § 13, Vol. I, p. 299, and cases there cited. If multi-purposed evidence is offered in a jury trial, the adversary is, of course, entitled to a limiting instruction, but in trials to the court, it is presumed that the judge will apply the evidence properly. It follows, therefore, that if evidence be offered for a limited purpose, or having been offered generally is objected to and thereafter is offered or received for a limited purpose, that the adversary is entitled to assume that it will be applied by the trial court to that limited purpose. If the exhibits

reproduced (R. 53-63) were introduced for a limited purpose, unrelated to the ultimate finding and conclusion appealed from, it follows that objection was neither proper nor required.

Appellees have kindly stipulated to an augmentation of the record of proceedings in the trial court in order that it may be clear to the Court of Appeals for what purpose the exhibits were offered. We must first, in view of appellees' brief, analyze the pleadings and theory of the action. We have caused (by stipulation referred to) the reproduction of the proceedings in the trial court pertaining to the admission of the exhibits printed (R. 53-63). We shall refer to page and line of such stipulated augmentation. We shall refer to appellees' exhibits *seriatim*, bearing in mind that Exhibit 2 (R. 60) apparently appears out of order but actually was Exhibit 2 in appellee Smith's case, the other exhibits having been appellee Boscola's.

a. Appellee Boscola's Theory of Action and Introduction of Exhibits—

Appellee Boscola relied for his relief (insofar as pertinent to this appeal), as set out in paragraph V of his petition (R. 5, line 20), on the fact that "... the United States was not in a state of war, nor was there a national emergency in existence" and again alleged (R. 6, lines 22 - 29) that the illegality of appellant's

actions (insofar as 34 USC 433 was concerned) lay in the *time* at which the power was exercised, not the *purpose* for which it was exercised.

EXHIBIT 1 — R. 53

Mr. Day began his use of the exhibit at page 3, line 5 "as a help to the Court in seeing the full background of this case" and actually offered it at page 4, line 2. Objection was made by U. S. counsel (page 4, lines 5 - 18) on the ground that it was "irrelevant to any issue before this Court." Mr. Day continued his offer (page 5, lines 5 - 8) "merely to acquaint the Court with the successive steps" and the Court refused the offer.

Exhibit 1 was again offered by counsel on page 11. The colloquy in the trial court reveals confusion at this point (because of the similarity of numbers and content of the exhibits) but it is clear at page 11, lines 15 - 17 that Exhibit 1 had not yet been admitted. Proper objection was made on page 12, line 12 *et seq.* on the ground of materiality (line 15). U. S. counsel further objected on the ground that the purpose for which the exhibit was offered was not within the scope of the pleadings (page 14, line 4), objection was overruled and the exhibit admitted (page 14, line 15).

EXHIBIT 3 — R. 55

Mr. Day offered this exhibit (p. 3, l. 5) “as a help to the Court in seeing the full background of this case”; it was objected to as “irrelevant to any issue before this Court” (p. 4, l. 5 - 18).

Mr. Day offered Exhibit 3 again (p. 11) to “show that they were recalled to active duty for one purpose—for the purpose of subjecting them to courts-martial” (p. 10, l. 4) and U. S. counsel made proper objection on the ground of materiality (p. 12, l. 15) and the scope of the pleadings (p. 14, l. 5); objection was overruled and the exhibit was admitted (p. 14, l. 15).

EXHIBIT 4 — R. 56

Mr. Day offered this exhibit (p. 3, l. 5) “as a help to the Court in seeing the full background of this case”; it was objected to as “irrelevant to any issue before this Court” (p. 4, l. 5 - 18).

Mr. Day offered Exhibit 4 again (p. 11, l. 14) for no specifically stated purpose. Objection was made on the ground of materiality (p. 12, l. 15) and the scope of the pleadings (p. 14, l. 5); objection was overruled and the exhibit was admitted (p. 14, l. 15).

EXHIBIT 5 — R. 58

While printed in the transcript, it will be noted that this exhibit was never admitted for any purpose and it may be disregarded.

In further support of appellants' position that appellee Boscola's Exhibits 1, 3 and 4 were not offered for the use the Court made of them, we quote portions of Mr. Day's argument.

On page 18, line 2, *et seq.* it is clear that Mr. Day is arguing that the Navy lacked the power to recall Boscola because there was then no national emergency. He further takes the position (p. 18, l. 9) that the recall was in aid of jurisdiction and hence unlawful. He further states (p. 20, l. 9, *et seq.*) "Conceding [*arguendo*] . . . that they are rightfully in the Navy . . . we certainly would not concede that the fact that they have jurisdiction of their person at the present time meant that they had jurisdiction of the crime at the time it was committed."

It is believed clear, upon careful analysis, that Mr. Day is contending that UCMJ 2 (4) — the article of the code under which the Navy claims court-martial jurisdiction over retired enlisted men — is unlawful and that a mere placing the man on active duty (where he is concededly subject to court-martial) does nothing to confer court-martial jurisdiction retroac-

tively. Appellants have never conceded or theorized in any way that because appellees were *at the time of the charges* on active duty, that such status in any way improved the Navy's legal position. The jurisdiction under Article 2 (4), if it exist at all, depends in no way upon active duty status. Appellees are either subject to court-martial or not because they are retired regulars and not because of their active status at the time of trial. The purpose of Mr. Day's offer of Exhibit 3 becomes clear in the light of his argument despite his words ". . . recalled to active duty for one purpose — for the purpose of subjecting them to courts-martial" (p. 10, l. 4). He is not here arguing an illegal call to active duty because of the motive or purpose. He has already attacked the validity of their call to active duty on the ground that no national emergency exists. It must be clear, appellants believe, that his offer of Exhibit 3, in the light of his argument, is an attack on what he believed to be an attempt to confer jurisdiction retroactively. Such an argument was never advanced or even contemplated by appellants. Since appellees have raised the issue *dehors* the record, appellants can only answer that the sole reason for a call to active duty was the theory that if a retired, reserve or other person is to be at the disposal of the Navy for twenty-four hours per day, he should be paid for it. Since active duty personnel draw 100%

pay and allowances and retired personnel draw only reduced pay and no allowances, simple justice required their call to active duty in order that they might be lawfully compensated before and during court-martial proceedings — regardless of the result thereof.

But we believe it clear from reading Mr. Day's own words that he had no idea during hearing, argument, and offering exhibits that his offerings would be worked into the trial judge's solution, *i.e.*, that the call to active duty was void because its purpose was not within the purpose of the statute.

b. Appellee Smith's Theory of Action and Introduction of Exhibits—

Appellee Smith relied for his relief (insofar as pertinent to this appeal) upon paragraph VI and VII of his petition (R. 12-13) which, while couched more generally than Boscola's, make it plain that he relies upon the fact (par. VI) he was "out of the Navy" when his act took place, and (par. VII) that double-jeopardy would be involved. The remainder of his petition deals with factual recitals and the paragraphs cited are the only ones where the illegality of appellants' actions is complained of. It is true that appellee Smith's paragraph VI carries the sentence "That no right in law or statute exists authorizing the U. S. Navy or respondents to recall the petitioner to active

duty” and while this could conceivably extend to the trial court’s finding and conclusions, it must be read in context and parallel to Boscola’s petition. Counsel was well aware of 34 USC 433 and knew that if a war or national emergency existed, there was *some* power to call retired enlisted men to active duty. He must, therefore, have been pleading the non-existence of war or national emergency and not the novel solution arrived at by the trial court. Similarly, appellee Smith’s paragraph VII carries a sentence “that the purported recall to active duty and attempted court-martial of petitioner by respondents *bears no reasonable relationship to the maintenance of discipline or regulations of the Naval forces of the United States [i.s.]*.” The fact that this language is such a faithful paraphrase of the reasoning of the Supreme Court in *U. S. ex rel. Toth v. Quarles*, 350 U.S. 11, 100 L.Ed. 8, 76 S.Ct. 1 (1955) shows plainly that the petitioner [appellee] Smith’s meaning was to plead the philosophy of the *Toth* case, not to question (in this paragraph, at least) the authority under 34 USC 433. Note should be taken specially of the *Toth* case at page 17, lines 8-9 (350 U.S.) and page 22, lines 4-8 where the similarity to Smith’s pleading is most marked. No question of a recall to active duty was involved in *Toth* and the use of *Toth* language did not inject it into this pleading.

EXHIBIT 2 — R. 60

Mr. Short offered this exhibit (p. 6, l. 3) and objection was made by U. S. counsel on the ground of relevancy (p. 6, l. 10-11). Mr. Short made it clear (p. 6, l. 12 *et seq.*; p. 7, l. 15 *et seq.*) that he was offering this exhibit on a theory of estoppel or loss of jurisdiction by transferring Smith to the retired list with U. S. knowledge that he had committed a crime while in Fleet Reserve status. The trial court, rather startlingly, conceded (p. 9, l. 7) "The relevancy doesn't appear to me" but he overruled the objection and admitted the exhibit.

Mr. Short then argued (p. 21, l. 3) "the actual purpose is to pull him in and kick him out" but when queried by the Court as to substantiating evidence, he admitted (p. 21, l. 6) "Nothing. If I am obliged to prove that . . . I can't."

c. The Trial Court Made Its Finding Solely on the Basis of the Erroneously Admitted Stipulation—

The parties entered the trial court with appellees contending jointly *inter alia* that recall to active duty under 34 USC 433 was improper because no national emergency existed. This contention, we believe, is borne out by the stipulation for consolidation (R. 16) which recites that the causes are "reasonably believed to involve the same general issues at law."

Faced with this state of the pleadings the trial court took evidence, admitted exhibits and factual stipulations over objection, and arrived at the conclusion (paraphrasing liberally from the Memorandum Opinion and Findings and Conclusions) that a statute authorizing recall for “duty” under certain conditions, did not authorize a recall for court-martial. As stated in our opening brief (p. 17), the Court allowed no opportunity to argue the definition of “duty” and the resultant reasoning was a surprise to appellants, and (we suspect) to appellees. In any event, the relief was accorded petitioners [appellees] *but not upon any ground or theory pleaded by them*. Likewise, the result was not based upon any evidence introduced by petitioners [appellees] *for that purpose* and the sole basis for the Court’s finding and conclusion was the erroneously admitted oral stipulation which was properly objected to on the grounds of “materiality and relevancy” (R. 52).

Appellants realize that since appellees have stated (appellees’ brief, page 5, line 27) “This stipulation and objection was taken . . . [after] all of the appellees’ exhibits had been admitted No objection of appellants to . . . exhibits is shown in the record on appeal” that it is incumbent upon appellants to show

that the exhibits were admitted for another purpose and *were neither offered for nor received by the Court* for the purpose for which they were ultimately used. In the absence of their being offered generally or for the specific use which the Court made of them, they did not have to be objected to and cannot be used to bolster the judgment.

Appellants believe that they have demonstrated from the stipulated augmentation of the transcript that appellees' exhibits were admitted on other bases and theories, neither encompassed in the pleadings nor argued by counsel. Even so, *after* all exhibits were admitted, the Court (p. 29, l. 9 *et seq.*) while evincing suspicion that the sole purpose of recall was for court-martial, conceded inability to make such a determination and Mr. Griffin (senior counsel for Smith) agreed with the Court (p. 29, l. 18). Matters remained in this status until page 36, line 9 when the Court remarked "That, of course, does not get to the one question which is the purpose of their recall."

It was at this stage of the proceeding that U. S. counsel entered the oral stipulation (p. 42, l. 17; R. 52) as to the purpose of the recall, at the same time preserving the objection as to materiality and relevancy.

The Court further made it clear (p. 43, l. 13 *et seq.*) that he was proceeding on the "stipulated fact" that appellees were recalled to active duty solely for the purpose of court-martial.

Appellants feel that they have met and gone beyond the standard noted by the Supreme Court in *Bridges v. Wixon*, 326 U.S. 135, at 156; 89 L.Ed. 2103; 65 S.Ct. 1443 (1945) where the Court said:

"In these *habeas corpus* proceedings the alien [cf. United States] does not prove he had an unfair hearing merely by proving the decision to be wrong . . . or by showing that incompetent evidence was admitted and considered. . . . But the case is different where evidence was improperly received and where *but for that evidence* [*i.s.*] it is wholly speculative whether the requisite finding would have been made."

Appellants submit that it is not even "speculative" as to whether the finding complained of would have been made absent the oral stipulation; it is a certainty.

Under the circumstances, then appellants feel that there was complete justification for their failing to print the portion of the proceedings dealing with the offering of and objections to the exhibits. We summarize briefly by repeating our opening position in this portion of the brief to the effect that the exhibits

in question were not offered for the use ultimately made of them by the Court, *contra* to appellees' argument. They were offered for another and limited purpose and must be presumed to have been so received. Even on their limited offer they were properly objected to. But counsel for appellees should not and cannot (as he does in his brief on page 5) argue that the exhibits, apart from the oral stipulation, sustain the judgment in any manner.

REPLY TO ANSWER TO APPELLANTS' ARGUMENT

Appellee states (page 6) that *Dakota* is not in point factually or legally. We are quite prepared to concede that the facts are different as they must be in every lawsuit for the case which is 100% "on all fours" is, of course, a legal myth. We cannot agree that they differ legally. The simple proposition advanced by the Supreme Court is that if the executive has *complete* discretion, the judiciary may not review it. We fail to see any legal distinction between power to take over a telephone company and power to order to active duty. Absolute discretion, says the Supreme Court, is not reviewable.

Appellees have at all times seemed unable to rid

themselves of the idea expressed in their brief on page 6 that Pasela's having been a civilian employee at the Navy Department is material. Analysis of that case shows clearly that the pertinent facts were (a) Pasela was a Fleet Reservist and hence subject to military law; (b) Pasela was tried for "bribery and conduct prejudicial to good order and discipline based upon . . . same theft for which he had been tried . . . district court" (167 F. 2d at 594), not for theft as contended by appellees in their brief, in violation of the Navy code; and (c) Pasela was returned to active duty for the purpose of court martial *but not in aid of jurisdiction*. We respectfully differ with the appellees in their statement (p. 7) that the court said "by way of *dictum* [*i.s.*] that . . . recall . . . [was] proper." The court very clearly erected three conditions precedent on page 594, line 25 *et seq.* (167 F. 2d) and said that the court-martial was "without power to try him" unless they were met. The first condition was the lawfulness of recall. If this be dictum, it is a peculiar way to express it.

We do not agree with the Court of Appeals that the lawfulness of the recall was material to the jurisdiction of the court-martial over a Fleet Reservist and had we appeared in the Connecticut District Court,

we should have so contended. However, that does not affect what the Court of Appeals for the Second Circuit *held*.

We are a bit at a loss to understand appellees' position as taken on page 7, line 7 *et seq.* of their brief wherein it is said, "... the fact of being ... on active duty at the time of court-martial was immaterial to the court-martial jurisdiction of the Navy under the applicable law." Appellees in this language apparently concede that Congress by Section 6 of the Act of June 25, 1938 (52 Stat. 1176) could make Fleet Reservists, active duty or no, amenable to courts-martial, while contending vigorously from pages 10 - 19 of their brief that the same body did not cover retired personnel by the Act of May 5, 1950 (64 Stat. 108), 50 USC 551, Uniform Code of Military Justice, Article 1. The reasoning escapes us.

Counsel (page 7) states that there is a "vast difference between changing from an active to an inactive duty status within the active reserve and changing from a retired status to active duty" but he does not expand his assertion. We feel that our opening brief (pp. 7 - 11) covers the matter.

Appellees (page 8) have misconstrued our position in stating that we cite *Pasela* for the proposi-

tion that recall for court-martial is permissible. Nothing could be farther from correct. Our point was that nothing in the *Pasela* law or the instant law says that the call to active duty for such purpose is not permissible. The authority is in the statute — not *Pasela*.

U. S. v. Warden and *U. S. v. MacDonald* cited on page 8 of appellees' brief have no application. Both petitioners were "civilian reservists" (*i.e.* weekend warriors) and it has always been conceded by the armed forces that release from active duty on the case of a civilian reservist is equivalent to a discharge and terminates court-martial jurisdiction. We feel that the *U. S. v. Warden* decision might have read more accurately in its last portion had it said ". . . and recall to active duty will not confer court-martial jurisdiction [if it does not exist already]." While confusingly similar at first glance, the cases are really wide apart for in that case the petitioner was arguing that he could not be court-martialed because there had been a termination of jurisdiction and that such jurisdiction could not be revived by recalling him to active status. In the instant case, the matter of court-martial jurisdiction has not even been touched and the petitioners argue only (in this court) that they cannot be retained on active duty.

As to appellees' remarks on pages 8 - 9 of their brief, we feel that the subject of "duty" has been adequately covered in our opening brief. We prefer our quotation from Winthrop on page 19 of our brief.

REPLY TO APPELLEES' ARGUMENT IN SUPPORT OF THE JUDGMENT

Replying to appellees' argument set out on page 9 - 10 to the end of the first full paragraph, we feel that our brief (pp. 7 - 13) is a more reasonable explanation of the statutory language. Congress did not say in the statute "in support of the war or emergency effort" and if Congress did not do so, the Court should not.

Adverting to appellees' brief from the last paragraph of page 10 through page 19, we find that every word is in the nature of a plea to the jurisdiction of the court-martial. This is neither the time nor the court in which to raise such issue. *Gusik v. Schilder*, 340 U.S. 128, 95 L.Ed. 146, 71 S.Ct. 149 (1950). Such issue can and should be raised before the military court which provides in paragraph 67, a, Manual for Courts-Martial, 1951 (3 CFR 1951 Supp. p. 144) that "Defenses . . . such as that trial is barred by . . . lack of jurisdiction . . . should ordinarily be asserted by motion to dismiss before a plea is entered." Peti-

tioners should not be permitted to challenge the jurisdiction of the military court in this proceeding as that issue was never reached by the trial court (R. 35).

Respectfully submitted,

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No. 15227

**In the United States Court of Appeals
for the Ninth Circuit**

ERNEST MATEO, JOSEPH OKU, JOSEPH K. NAKILA,
JOSEPH ACELLO, WADE H. REDMON, HARRY L. PERRY,
HERMAN K. KAPULE, KENTON AICHELE, WILLIAM T.
AHIA, AND JAMES B. JAY, ON BEHALF OF THEM-
SELVES AND ON BEHALF OF OTHER EMPLOYEES OF THE
DEFENDANTS SIMILARLY SITUATED, APPELLANTS

v.

AUTO RENTAL COMPANY, LTD., AND THACKER TRANS-
PORTATION Co., LTD., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF HAWAII

BRIEF FOR JAMES P. MITCHELL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, AS AMICUS
CURIAE

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BRIEF FOR JAMES P. MITCHELL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, AS AMICUS
CURIAE

STATEMENT OF THE CASE

The Secretary of Labor, United States Department of Labor, by virtue of Reorganization Plan No. 6 of 1950 (15 F. R. 3174), 64 Stat. 1263, 5 U. S. C. 133z-15, effective May 24, 1950, is responsible for the duties theretofore vested in the Administrator of the Wage and Hour Division by the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C. Sec. 201 *et seq.*).

This appeal presents an important question concerning the application of the Act's "in commerce" phase of coverage. Therefore, the Secretary of Labor respectfully submits this brief as *amicus curiae*.

This is an action under Section 16 (b) of the Act for the recovery of unpaid overtime compensation and attorneys' fees. It was filed by certain of appellees' employees, known as "airporter" drivers. During the period for which these drivers seek recovery, they were engaged in transporting airline and steamship passengers (arriving from or leaving for points outside the Territory of Hawaii) between the Honolulu International Airport or the Port of Honolulu, as the case may be, and the business and Waikiki hotel districts of Honolulu. The pleadings raised a number of questions, but by agreement of the trial court and the parties the basic question of whether the "airporter" drivers were within the general coverage of the Act, was tried first. On this question, the trial court held that the drivers were engaged in "local," not interstate, commerce and, therefore, not within the coverage of the Act (R. 141).

ARGUMENT

Employees engaged in furnishing integrated connecting transportation for travelers and property on interstate trips, are engaged "in commerce" within the meaning of the Fair Labor Standards Act

Although the decision of the Fourth Circuit in *Airlines Transp. v. Tobin*, 198 F. 2d 249 (C. A. 4, 1952), passed on the precise coverage question here presented and, as we shall show is plainly a correct ap-

plication of the principles which the Supreme Court has established for determining coverage under this and similar Acts, the court below chose to rely upon the district court decision rendered five years earlier in the case of *Cederblade v. Parmelee Transportation Co.*, 94 F. Supp. 965 (N. D. Ill., 1947),¹ affirmed on other grounds, 166 F. 2d 554 (C. A. 7).

The intervening time between the *Cederblade* decision and the Fourth Circuit's decision is highly significant, because in that interval the Supreme Court handed down its second decision in *United States v. Capital Transit Co.*, 338 U. S. 286 (November 14, 1949),² rehearing denied, 338 U. S. 901, which contradicted the basic reasoning on which the *Cederblade* decision was premised. The *Cederblade* decision rested solely on the portion of the Supreme Court's decision in *United States v. Yellow Cab Co.*, 332 U. S. 218, which ruled that "when local taxicabs merely convey interstate train passengers between their homes and the railroad station *in the normal course of their independent local service*" (*Id.*, at 233; emphasis added), they were not engaged in interstate commerce within the meaning of the Sherman Act. As the district court noted in the *Cederblade* opinion, the Supreme Court, in the same *Yellow Cab* decision,

¹ The only question presented on appeal of the *Cederblade* case apparently related to the transportation between railroad depots, which the appellate court held to be exempt under Section 13 (b) (1) as part of the railroad transportation. Nothing was said in appellate opinion about the airport transportation.

² Reaffirming *United States v. Capital Transit Co.*, 325 U. S. 357, rehearing denied 325 U. S. 896.

had drawn a distinction between such transportation which was "only casual and incidental" to a general local taxicab service, and the Parmelee Company's inter-station transportation which was performed pursuant to contractual arrangement with the main interstate carrier, the Parmelee Company's transportation being specifically held "an integral step in the interstate movement." With respect to the Parmelee Company's operations, the Supreme Court said:

When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character. *The Daniel Ball*, 10 Wall. 557, 565. That portion must be viewed in its relation to the entire journey rather than in isolation. So viewed, it is an integral step in the interstate movement. [332 U. S. at 228-229.]

However, the *Cederblade* decision construed this ruling as being limited to the interstate transportation of travelers *already in the midst of an interstate trip*, while broadly interpreting the "local taxicab" portion of the *Yellow Cab* decision to mean that "hauling [of] passengers to and from stations and terminals, * * * *preceding or following* the interstate journey" is local and not interstate, regardless of any contractual or special connection with the main interstate carrier (*Id.* at 969). That this was an erroneous interpretation of the "local taxicab"

ruling was made clear beyond doubt in the Supreme Court's subsequent decision in the *Capital Transit* case, *supra*. The Court there specifically rejected the argument that its *Yellow Cab* ruling with respect to local taxicabs applied to transportation of passengers by District of Columbia bus and trolley lines to stops within the District where the passengers boarded busses to nearby Virginia, and reaffirmed its holding in the earlier *Capital Transit* case (325 U. S. 357, rehearing denied, 325 U. S. 896) that such transportation is in interstate commerce.³

Thus the Fourth Circuit, in deciding the *Airlines Transportation* case, had the benefit of the second *Capital Transit* decision while the district court in *Cederblade* did not. Had the district court been aware of this clear-cut Supreme Court decision on the limited application of its "local taxicab" ruling, we venture to say that it would have reached the same result as the Fourth Circuit did in the *Airlines Transportation* case. For the court in *Cederblade* expressly recognized that "airport bus operations cannot with complete consistency be regarded as local taxicab operations" (94 F. Supp. at 969).

The "airporter" ground transportation here furnished passengers directly and immediately to or from their interstate trips is plainly as much "an integral

³ Indeed, in the *Yellow Cab* opinion itself, the Court directed attention to the limited situation it was ruling upon: "All that we hold here is that when local taxicabs *merely* convey interstate train passengers between their homes and the railroad station *in the normal course of their independent local service*, that service is not an integral part of interstate transportation" (332 U. S. at 233). [Emphasis added.]

step in the interstate movement'' of passengers as was the Parmelee Company's service to passengers to and from railroad stations in the *Yellow Cab* case, and much more so than was the Transit Company's service to Virginia-bound passengers in the *Capital Transit* case. Plainly appellees' "airporter" drivers are not transporting these passengers merely as an incident to a general local transportation service. Not only is this transportation service performed pursuant to a contractual arrangement between the airlines and appellees, but much of it is booked and paid for by the passengers when they purchase their airline tickets. Indeed, over half of appellee's ground transportation is prebooked or "coupon" (prepaid) business (R. 52, 105-106). In this important respect, the instant case is not only stronger than the *Airlines Transportation* case, but it is plainly distinguishable from the *Cederblade* case for, as there pointed out, the air passengers paid the ground carrier direct for the ground portion of their journey (see 94 F. Supp. at 962). Here, as the undisputed evidence shows, a substantial number of passengers pay *direct to airlines* or travel agencies and are thereupon issued coupons for the ground portion of their journey (R. 96-97). These coupons are handed to appellees' drivers by the passengers when they arrive at the airport and transfer from the airplane to the waiting "airporter" bus. The drivers turn the coupons in to appellees who then bill the issuing airline or travel agency, neither of whom remits the entire amount since they are entitled to retain 10 percent (R. 107-8).

Not only is it clear that the *Airlines Transportation* decision, rather than the *Cederblade* decision, correctly construed the Supreme Court's *Yellow Cab* and *Capital Transit* decisions, but the decision reached in the *Airlines Transportation* case plainly accords with the principles of the Supreme Court's decisions construing the "in commerce" coverage of the Fair Labor Standards Act.

The most pertinent of the Supreme Court's many decisions under this Act is *Walling v. Jacksonville Paper Co.*, 317 U. S. 564. The problem there was whether transportation from the warehouse of a wholesaler to its selling outlets in the same State was local or a continuation of the interstate movement of the goods into the warehouse. The Supreme Court held that if the ultimate destination of goods in another State is known at the time they begin their movement in the State of origin, as where they are obtained for a particular customer "pursuant to a prior order, contract, or understanding" with him, the goods remain "in commerce" until they reach that customer, notwithstanding a "break in their physical continuity of transit" and "a temporary holding of the goods" at a warehouse after arrival in the State of destination (317 U. S. at 569).⁴

⁴ While the *Jacksonville Paper* case dealt with the end of the movement, whereas the instant case is concerned with the beginning as well as the end, the same principles are equally applicable where there is the requisite "practical continuity of movement." See *Stewart-Jordon Distributing Co. v. Tobin*, 210 F. 2d 427 (C. A. 5), certiorari denied, 347 U. S. 1013; *Rockton & Rion Railroad v. Walling*, 146 F. 2d 111 (C. A. 4), certiorari denied, 324 U. S. 880; *Republic Pictures Corporation v. Kappler*, 151

The principles of the *Jacksonville Paper* case, we submit, apply with even greater force here. As appellees' own witness testified, 70 percent of the travelers who fly to Honolulu from the mainland have definite hotel reservations while 30 percent of them also have a "prebooked or prepaid transfer" from the airport to their respective hotels (R. 101-103).⁵ These passengers have not arrived at their predetermined destinations when they deplane at the airport; they have only completed the air portion of their journey. This is also true of the other incoming passengers, i. e., those without hotel reservations in Honolulu. Airports of necessity are located at a substantial distance from the cities which they serve, as the Fourth Circuit pointed out in the *Airlines Transportation* case (198 F. 2d at 251), and passengers ordinarily have no business in them other than commencing or completing the air portion of their journey. For this reason, too, it is equally plain that passengers with airline reservations to the main-

F. 2d 543 (C. A. 8), affirmed, 327 U. S. 757, rehearing denied, 327 U. S. 817. The coverage question in *Stewart-Jordan* concerned driver-helpers of an intrastate beer distributor whose duties consisted of picking up "empties" and transporting them from the customers' establishments to the distributor's warehouse where they were checked, sorted and then loaded into railroad cars for shipment to out-of-State breweries. The Fifth Circuit, on the ground that the Supreme Court's *Jacksonville Paper* decision was "controlling" (210 F. 2d at 431), affirmed the trial court's holding that the interstate shipment of the "empties" began when the "empties" were picked up by the driver-helpers and continued through the warehouse to the railroad car and to the ultimate destination of such "empties" at the out-of-State breweries.

⁵ These percentages also apply to steamship passengers (R. 102, 103).

land or to other points outside the Territory of Hawaii have fixed interstate destinations at the time appellees' transportation from Honolulu to the airport is *begun*.

In the *Jacksonville Paper* case, the Supreme Court held that "The entry of the goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act" (317 U. S. at 568). It is even clearer that the interstate journey has not been terminated, if indeed even interrupted, by the transfer of passengers directly from an airplane into a waiting limousine which immediately transports them the remaining miles to the city of their destination. And plainly transportation by limousine for the sole and special purpose of enplaning for a predetermined interstate destination is no less an integral part of a continuous interstate journey.

"Practical continuity in transit" was held in the *Jacksonville Paper* case to be the condition "necessary to keep a movement of goods 'in commerce' within the meaning of the Act." Furnishing this "practical continuity in transit" is the reason for the contractual arrangements between appellees and the airlines. Casual service is given by taxicabs and other carriers (R. 87-88), but appellees are required to, and do, give *connecting* service. The schedules of their "airporter" busses are tied in with the schedules of the airlines (R. 47, 63, 120, 123). Even when airplanes turn back after taking off because of engine difficulties, appellees are notified so that they can re-schedule their service to take care of the passengers

and the crew during the "lay-over" (R. 63-64). This "practical continuity in transit" benefits not only the passengers but also the airlines by facilitating "the expedition of their own airline business with respect to prompt arrivals and departures in maintaining schedules" (Cf. opinion below, R. 140).

The *Jacksonville Paper* case also makes it clear that the failure of Congress, when it passed the Act, to use its full power under the Commerce Clause, is no reason for giving the phrase "engaged in commerce" a "restricted meaning" (Cf. opinion below, R. 139). For it was there held (317 U. S. 564, 567) "that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce. There is no indication (apart from the exemptions contained in Sec. 13) that, once the goods entered the channels of interstate commerce, Congress stopped short of control over the entire movement of them until their interstate journey was ended." As stated by the Supreme Court in *Overstreet v. North Shore Corp.*, 318 U. S. 125, at 128:

Respondent contends that petitioners are in this category, that their activities are local and at most only affect commerce. But the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase "engaged in commerce." We said in the *Jacksonville Paper Co.* case, *supra*, "It is clear that the purpose of the Act was to extend federal control

in this field throughout the farthest reaches of the channels of interstate commerce.”⁶

CONCLUSION

The holding below on the coverage issue should be reversed.

Respectfully submitted.

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OCTOBER 1956.

⁶The Fair Labor Standards Amendments of 1949 (Act of October 26, 1949, c. 736, 63 Stat. 910, 29 U. S. C., Supp. IV, sec. 201) left intact the broad scope of coverage under the original definition of “commerce” in Section 3 (b). The only modification in the definition of “commerce,” was a slight change to expand to some extent the group covered under the former definition. The definition of “commerce” previously referred to commerce “from any State to any place outside thereof.” The Amendment simply substituted “between any State and any place outside thereof.”

No. 15,227

United States Court of Appeals
For the Ninth Circuit

ERNEST MATEO, JOSEPH OKU, JOSEPH K.
NAKILA, JOSEPH ACELLO, WADE H.
REDMON, HARRY L. PERRY, HERMAN
K. KAPULE, KENTON AICHELE, WIL-
LIAM T. AHIA, and JAMES B. JAY, on
behalf of themselves and on behalf of
other employees of the defendants
similarly situated,

Appellants,

vs.

AUTO RENTAL COMPANY, LTD., and
THACKER TRANSPORTATION Co., LTD.,
Appellees.

On Appeal from the United States District Court
for the District of Hawaii.

REPLY BRIEF FOR APPELLEES.

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FILE

DEC - 5 19

PAUL P. O'BRIEN

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No. 15,227

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Appellants,

vs.

AUTO RENTAL COMPANY, LTD., and

THACKER TRANSPORTATION Co., LTD.,
Appellees.

On Appeal from the United States District Court
for the District of Hawaii.

REPLY BRIEF FOR APPELLEES.

JURISDICTION.

Jurisdiction of the United States District Court for the District of Hawaii was invoked under 28 USCA § 1337. Jurisdiction of this Court is conferred by 28 USCA § 1291.

The judgment of the District Court that the plaintiffs were not “engaged in commerce” within the meaning of 29 USCA § 207(a) with the order dismissing the

complaint, filed in the District Court on May 2, 1956, is appealable to the United States Court of Appeals for the Ninth Circuit pursuant to the provisions of 28 USCA § 1291.

The pleadings necessary to show jurisdiction in this Court are as follows: (a) Complaint (R. 2); (b) defendants' answers to the complaint (R. 6, 16); (c) stipulation and order for entry of judgment and judgment (R. 142); (d) notice of appeal (R. 147); and (e) statement of points on which Appellants intend to rely (R. 149).

STATUTORY PROVISIONS INVOLVED.

This case arises under the Fair Labor Standards Act, 1938 (52 Stat. 1060, 29 USCA § 201, et seq.), hereinafter called the "Act". The pertinent provisions of the Act are as follows:

29 USCA § 216(b)

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."

29 USCA § 207(a)

"(a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

29 *USCA* § 216(b)

“(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.”

29 *USCA* § 255(a)

“Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

“(a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;”

29 *USCA* § 256

“In determining when an action is commenced for the purposes of section 255 of this title, an ac-

tion commenced on or after May 14, 1947 under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—

“(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

“(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced.”

STATEMENT OF THE CASE.

This action was brought by certain employees of the Appellees engaged during the period of employment encompassed by the complaint in driving equipment owned by the Appellees and devoted to transportation of persons on the Island of Oahu, Territory of Hawaii, including transportation to and from the Waikiki district of Honolulu, and Honolulu itself, and the Honolulu piers and Honolulu Airport, and also sightseeing tours around various areas of Honolulu and the Island of Oahu.

The complaint was filed on December 10, 1954. Written consents of persons named in the complaint were

filed in the District Court on September 6, 1955. In a preliminary proceeding the District Court ruled that under the provisions of 29 USCA § 255 and § 256, the statute of limitations continued to run on the claims of the plaintiffs named in the complaint until such time as the individual named claimant's written consent was filed with the Court. This ruling of the District Court is challenged by the Appellants herein.

By agreement of the District Court and the parties the question of coverage within the meaning of 29 USCA § 207(a) and § 203(b) of the Act as to certain named plaintiffs engaged in driving so-called "airporters" was tried first (R. 31-34), it being recognized that if the named plaintiffs were found not to be within the coverage of the Act pursuant to the provisions of said sections, this would be dispositive of the entire complaint.

The evidence adduced showed that the employees-Appellants herein transported passengers arriving and departing from Honolulu Airport by various airlines, and arriving in and departing from Honolulu by ship; that such passengers were transported to and from hotels and apartments through the Waikiki area and hotels in the business area of Honolulu; that agreements existed between several airlines and Appellees covering rates and availability of equipment to transport passengers and crews, but that there were no agreements with other airlines with respect to transportation of passengers, whose passengers were also carried by Appellees; that airline and ship passengers could secure ground transportation on the Appellees'

vehicles in any of three ways: (1) by booking space in advance through mainland or local travel agents with cash or charge procedures following arrival (hereinafter sometimes referred to as "prebooked"); (2) prepayment of the fare to such travel agents in exchange for a redeemable coupon or voucher good for transportation to or from the airport on any Appellees' equipment (hereinafter sometimes referred to as "prepaid"); and (3) payment of cash fare on a space availability basis; that the prepaid vouchers or prebooking was made through many independent travel agencies throughout the mainland, including several airlines, which had established travel agency departments; that many of the airlines whose passengers were transported had no travel agency department issuing such coupons or vouchers; that the unused coupons or vouchers were redeemable in cash or could be used as a credit in purchasing from Appellees sightseeing tour tickets for island tours or other transportation on Oahu, and, if not used for transportation on arrival, could be used later for transportation to the airport or docks for any purpose; that the "airporter" equipment transporting passengers to the Waikiki area would proceed to the tourist hotels and apartments within the area stopping anywhere the streets would accommodate them; that transportation was available from the airport or from Waikiki or the port of Honolulu on a space availability basis for any coupon or voucher holder, or a cash fare, without regard to particular flights or particular airlines, including those with whom Appellees had no arrangement to supply transportation to passengers; that crews of airplanes were transported to hotels in Wai-

kiki at the direction and control of the captain as to any additional passengers to be carried; that passengers returning by reason of airplane engine failure would be transported as required at the expense of the airline, although this occurred irregularly; that on layover flights proceeding beyond Hawaii passengers of some airlines were taken in for a meal and returned at airline expense; that 70 per cent of the people coming to Hawaii both by plane and by boat have an airline ticket and a hotel reservation and do not have prebooked or prepaid ground transportation; that all vehicles are licensed locally as taxis, carrying taxi plates, and the Appellants are licensed as taxi drivers and must have such licenses to operate the "airporters"; that the fares charged by Appellees on the "airporter" and other equipment operated by it are filed with the Territorial utilities commission.

Additional facts established in the record and too lengthy to be summarized here are referred to hereinafter in the argument.

The findings and conclusions of the District Court on the question of coverage under the Act were made by oral ruling and are set forth in the Record, pages 138-141, inclusive. In summary, these findings and conclusions are (1) that the prepayment of fares pursuant to the vouchers had little, if any, relevancy to the coverage question under the Act; (2) that the agreements in evidence between some of the airlines and Appellees were nothing more than an expression by the airlines of a desire to convenience their passengers and facilitate expedition of their own airline business with respect to

prompt arrivals and departures; (3) that these same agreements did not bind incoming or outgoing passengers to take these particular airporter busses; (4) that the airporter busses were available to others on a cash basis, space being available; (5) that at the terminus end of the transportation in Waikiki the airporter busses would stop anywhere that the streets would accommodate them; (6) that the airporter bus vehicle is an elongated seven-passenger sedan made to carry some thirty or forty people [sic], the length of the vehicle being such as to be incapable of being accommodated on some of the narrow streets of some parts of Waikiki; (7) that the airline passengers arrive at their destination when they have alighted from the airplane at the Honolulu airport; and (8) that the certain named drivers, Appellants herein, were engaged in purely local commerce of a taxi-like nature and were not engaged in commerce within the meaning of the Act.

ARGUMENT.

I. THIS ACTION WAS NOT COMMENCED AS TO NAMED PLAINTIFFS, APPELLANTS HEREIN, UNTIL SUCH TIME AS THEIR WRITTEN CONSENTS TO BECOME PARTIES WERE FILED IN THE DISTRICT COURT BELOW.

Appellants contend that this action should be deemed to have commenced as to the named plaintiffs as of the date of the filing of the complaint, rather than the date when the named plaintiffs' written consents to become parties plaintiff were filed in court. The plain wording of Section 7 of the Portal-to-Portal Act permits no

such construction. This section, 29 USCA § 256, reads as follows:

“In determining when an action is commenced for the purposes of section 255 of this title, an action commenced on or after May 14, 1946 under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—

“(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

“(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced. May 14, 1947, c. 52, § 7, 61 Stat. 88.”

The requirements of this section could not be more specifically spelled out as to when a collective or class action is to be deemed to commence for purposes of the two-year statute of limitations contained in Section 255. Such an action is to be considered commenced as to any individual claimant as of the date the complaint is filed only if (1) the individual claimant is specifically named as a party plaintiff, *and* (2) such claimant's written consent to become a party plaintiff is filed in the court on *such date* as the complaint was filed. Subsec-

tion (b) is clearly intended to cover exactly the situation here presented as one of the situations that were to be anticipated in collective or class actions; namely, if the complaint is filed specifically naming individual claimants as parties plaintiff but a written consent for an individual named claimant was not filed concurrently, then as to such individual claimant, the action is commenced on the subsequent date on which such written consent is filed.

That this is the proper construction and application of the statute is clear from the following cases:

Drabkin, et al. v. Gibbs & Hill Inc. (USDC, SDNY, 1947) 74 F. Supp. 758;

Burrell v. LaFollette Coach Lines (USDC, Tenn., 1951) 97 F. Supp. 279;

Lindell v. General Electric Co. (Wash. Sup. Ct., 1954) 267 P. 2d 709.

Appellants argue that the conjunctive “and” in subsection (a) should be read as “or”. This, they contend, would fulfill the purpose of the statute which, the Appellants state, requires the filing of written consents in order to insure the defendant employer of notice of individual claims. And such notice, they say, is already adequately served by naming of the parties without filing consents. They also say that reading “and” as “or” in subsection (a) would thereby be consistent with the “or” used in subsection (b). The answer to this is that subsection (b) covers entirely different situations from subsection (a). Appellants also miss the fact that one basic purpose of the requirement of written consents is the specific purpose of determining the applicability of

the statute of limitations. As the court states in *Burrell v. LaFollette Coach Lines, supra*, page 283:

“One purpose in naming the parties plaintiff in the initial pleading is to apprise the defendant of individuals against whom he must prepare his defense. In the *Drabkin* case, however, the court pointed out that the requirement for the written consent of the named plaintiffs has a purpose beyond that of notice. The more specific purpose is that ‘of determining the applicability of the statute of limitations.’ ”

Congress did this by anticipating a variety of situations in collective and class actions and providing for them accordingly by a statute that is clear on its face and must be applied accordingly.

Appellants attempt to claim that the complaint does not present a collective or class action but should be construed as a joinder of individual plaintiffs under Rule 20(a) of the Federal Rules of Civil Procedure, and individual written consents should not therefore be required. The cases cited by them as authority for this approach present entirely different pleadings. In *Deley, et al. v. Atlantic Box and Lumber Corp.*, (USDC, NJ, 1954), 119 F. Supp. 727, four named plaintiffs brought the action, each suing in separate counts. So also in *MacDonald v. Martinelli* (USDC, NY, 1950), 120 F. Supp. 382, cited by Appellants, the action was brought by named individual employees in their individual capacities and for their own individual benefit respectively. As the court there states (p. 383): “[The action] was not brought for and in behalf of other employees similarly situated.” And in *Deley, supra*, the court dis-

tinguishes those cases in which an action is filed by an employee or employees in behalf of himself or themselves and other employees similarly situated. Here the very caption of the complaint of Appellants below prevents the application of the authorities they cite. The caption of the complaint names "Ernest Mateo [and others], on behalf of themselves and on behalf of other employees of the defendants similarly situated" as the plaintiffs. The complaint does not set forth separate claims; it is signed by the attorney himself as "Attorney for Plaintiffs."

In *Burrell v. LaFollette Coach Lines, supra*, the original complaint was filed on behalf of 32 named plaintiffs "and all other persons and employees of defendant who are or were similarly situated." It was signed by attorneys for the plaintiffs and sworn to by Burrell, one of the named plaintiffs. The court ruled that as to the plaintiff who had sworn to the original complaint, this constituted compliance with the requirement of written consent; that as to the others, it was clear that an attempt to make it a class action was indicated by "and all other persons and employees of the defendant who are or were similarly situated." As to all other named plaintiffs, therefore, the action was dismissed, no consents having been filed pursuant to Section 256 as to such specifically named plaintiffs.

The ruling of the Court below that, as to the named plaintiffs, Appellants herein, this action was not commenced, for purposes of determining the application of the statute of limitations, until such time as their writ-

ten consents to become parties plaintiffs were filed in court should be affirmed.

II. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE CERTAIN NAMED EMPLOYEES, APPELLANTS HEREIN, WHO WERE ENGAGED IN OPERATING SO-CALLED "AIR-PORTERS" TO AND FROM HONOLULU AIRPORT (AND PORT OF HONOLULU) AND THE WAIKIKI AREA OF THE CITY OF HONOLULU, WERE ENGAGED IN LOCAL COMMERCE AND WERE NOT ENGAGED IN COMMERCE WITHIN THE MEANING OF THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED. (29 USCA § 201, ET SEQ.)

We are here concerned with the limitations upon the phrase "engaged in commerce" in 29 USCA § 207(a) as distinguished from the phrase "engaged . . . in the production of goods for commerce" in the same section. The leading case of *McLeod v. Threlkeld*, 319 U.S. 491, 87 L.Ed. 1538, defines the test here to be considered as follows (p. 497):

"The test under this present act, to determine whether an employee is engaged in commerce, is not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or so closely related to the movement of the commerce as to be a part of it."

The District Court concluded from all of the evidence adduced that the Appellants herein were engaged in purely local commerce of a taxi-like nature and were not engaged in commerce as the phrase is used in the Act (R. 141). The District Court recognized that the basic question presented was that of drawing the line between the reach of the federal power intended by

Congress under the Act and that area of local commerce in which it can be said that activities of employees are not so closely related to the movement of interstate commerce as to be a part of it.

In *Overstreet v. North Shore Corporation*, 318 U.S. 125, 129, 87 L.Ed. 656, 660, the Supreme Court states that "in determining what constitutes 'commerce' or 'engaged in commerce' we are guided by practical considerations," and in *United States v. Yellow Cab Co.*, 332 U.S. 218, 231, 91 L.Ed. 2010, the Supreme Court states (p. 231):

"But interstate commerce is an intensely practical concept drawn from the normal and accepted course of business. *Swift & Co. v. United States*, 196 US 375, 398, 49 L ed 518, 525, 25 S Ct 276; *North American Co. v. Securities & Exch. Commission*, 327 US 686, 705, 90 L ed 945, 958, 66 S Ct 785. And interstate journeys are to be measured by 'the commonly accepted sense of the transportation concept.' *United States v. Capital Transit Co.* 325 US 357, 363, 89 L ed 1663, 1669, 65 S Ct 1176. Moreover, what may fairly be said to be the limits of an interstate shipment of goods and chattels may not necessarily be the commonly accepted limits of an individual's interstate journey. We must accordingly mark the beginning and end of a particular kind of interstate commerce by its own practical considerations."

The Supreme Court there held, in part, that the transportation by taxicab of persons and their luggage to and from their homes, offices and hotels in Chicago and the railroad stations where they departed or returned on interstate journeys was too unrelated to interstate

commerce to constitute a part thereof within the meaning of the Sherman Act. The transportation was supplied on an intermingled basis with the local operations of the taxicabs. The significant point is that it was that allegedly interstate part of the business upon which the government rested the validity of the complaint and which the Supreme Court found too unrelated to interstate commerce to constitute a part thereof.

A. The activities of the Appellants herein must be viewed against the background of the transportation furnished.

The District Court properly viewed the evidence in the light of this principle of the "intensely practical concept drawn from the normal and accepted course of business." Hawaii is known the world over as a tourist paradise, and is a terminus for tourists arriving daily by plane and by ship for vacations. Travellers arrive at their destination, the terminus of the transpacific journey, as the District Court phrased it, where in local parlance they are greeted at the airport with flower leis and hula girls and have available the facility of sending a radiogram home that they have arrived safely in Hawaii (R. 141). The same is equally true of the tourist passengers, businessmen and returning Island residents disembarking from any of a multitude of ships at the docks in Honolulu to be greeted with music and leis amidst welcoming crowds. Tourist hotels increase in number yearly throughout Waikiki and other areas of Hawaii to meet the requirements of the ever-increasing tourist industry (R. 78, 79). It is in this background that Appellees and other ground transportation companies, as well as airlines, steamship companies and

hotels engage in the intense competition of obtaining the business of the travelers to Hawaii.

During the period of employment of the Appellants, the Appellees competed with at least two other ground transportation operators entering the airport to pick up or deposit prepaid or prebooked passengers. These same operators and others were picking up cash fares in a variety of equipment (R. 87). Appellees' airport equipment and other equipment were used to transport steamship passengers to and from the Honolulu docks and the hotels. "Airporter" equipment was occasionally used with other equipment for sightseeing tours on the Island of Oahu (R. 88, 89).

Appellees competed with other companies for cash fares (R. 99) and were in direct competition with other companies for prepaid and prebooked transportation (R. 87, 100). Appellees deal with several hundred independent travel agencies throughout the country (R. 109). The travel agent is arranging air or ship transportation, tours to the other islands of the Territory of Hawaii, ground transportation, tours of the Island of Oahu, and hotel reservations throughout the Territory (R. 43, 109). During the period involved in this proceeding *some*, but not all, airline companies had separate departments acting in every capacity that a travel agent does. Ground transportation coupons or vouchers issued by an airline were therefore the same type of coupon or voucher sold by independent travel agents (R. 85). Approximately 70 per cent of the travellers coming to Hawaii by plane and by ship have an airline

or steamship ticket and a hotel reservation (R. 102, 123). They do *not* have prebooked or prepaid coupons or vouchers for ground transportation. This 70 per cent left the plane or ship and took the nearest cab or conveyance. The remaining 30 per cent are prepaid or prebooked. *From* the hotels *to* the airport the preponderance of the passengers were cash fares (R. 93). The prepaid and prebooked coupon system applied in the same manner with respect to passengers arriving by ship (R. 86). Tours in Appellees' equipment, or that of other carriers, were arranged by the multitude of independent travel agents, on a prebooked or prepaid coupon basis, prior to the tourists' departure from the mainland, whether the tour was an "around the island" tour, some scenic tour in Honolulu, or a tour of Pearl Harbor (R. 109).

Unused ground transportation coupons, which would include airport-to-Waikiki, or the Honolulu dock area and Waikiki, and vice versa, were redeemable in cash or could be credited to the purchase of island tours arranged subsequent to arrival in Hawaii (R. 84). The travel agent on the mainland, or in Hawaii, might or might not include a coupon for transportation to the hotel when he arranged transportation; this depended upon the desires of the traveller (R. 81-83). If the traveller had friends meeting him at the airport or dock he might purchase only the transportation to Hawaii and have his hotel accommodations prearranged (R. 84). Or, the traveller arriving and met by friends or members of his family could redeem the coupon or voucher for cash (R. 84).

- B. The prebooking or prepayment of ground transportation is not a factor properly relevant to any determination that these Appellants can be said to be "engaged in commerce".**

On the basis of all the evidence, the District Court concluded that the prepayment of fares was not relevant to the question of whether or not the employees operating airporter busses were engaged in interstate commerce. The record amply supports this conclusion. It is clear that these were but a phase of the development of additional business as between the interest of the Appellees in promoting ground transportation anywhere on the Island of Oahu and the interest of a multitude of independent travel agencies on the mainland with whom the Appellees had established connections. From the viewpoint of the travel agent, the possibility of sale to a traveller of a coupon for ground transportation which the traveller might or might not decide to take was in no different category than the travel agent's prearrangement of a variety of tours while on the Island of Oahu or in the Territory, or prearrangement of hotel reservations. The travel agent was promoting the business in the interest of his commissions. It is also established by the record that the airlines, in making sales of such coupons or prearranging the transportation, had an identical interest with that of the independent travel agents, and functioned merely through a travel agent department which, as to them, the evidence showed was a relatively recent development by reason of the establishment of such department (R. 85, 96). Moreover, the fact that the coupon was exchangeable for cash or could be applied to other tour transportation (R. 84) and could also be used on other equip-

ment than that driven by Appellants, while any traveller could hire transportation on the "airporter" at the same price as the coupon holder (R. 54, 55, 56, 69, 84), clearly establishes the immateriality of the use of such coupons in relationship to the issue here in question.

Clearly, the injection of prebooking and prepaid coupons by reason of the development of the travel agency business provides no valid basis to conclude that the transportation of these passengers by Appellees is thereby removed from the entire general pattern of local transportation service to an integrated connecting link of interstate commerce. In choosing to rely upon *Cederblade v. Parmelee Transportation Co.*, 94 F. Supp. 965 (N.D. Ill., 1947), the District Court could properly consider these prepaid coupons and prebookings as inconsequential.

C. The agreements between the Appellees and several airlines do not create such a contractual arrangement with an interstate carrier to thereby establish transportation to and from hotels and the Waikiki and Honolulu areas as an integral stop in the interstate commerce movement.

Appellants, and the Secretary of Labor in his brief, attempt to have these agreements identical with those in *Airlines Transportation Inc. v. Tobin*, 198 F. 2d 249 (CA 4, 1952). The record simply does not support this. On the contrary, the District Court properly concluded that these agreements were for an entirely different purpose. Admittedly, many provisions of the agreements in evidence were similar; practically, however, the agreements here were but one element of the "catch-

as-catch-can'' of competition of local taxi and tour operators for fares. In effect, the District Court therefore properly concluded that the existence of these agreements did not constitute a factor in the determination of engagement in commerce by these employees-Appellants ''airporter'' drivers.

In the *Airlines Transportation* case it was provided that the limousines would be used exclusively in the services of the contracting airlines (p. 250 of the opinion). Nothing could be further from the facts here established. They were used to transport travellers by ship to and from the docks in Honolulu (R. 88, 89); they were used for tours when cruise ships arrived or tour parties (R. 89). Basically, the equipment driven by Appellants was merely a part of the fleet of equipment that Appellees used in carrying any and all fares they could pick up, whether to and from the airport, to and from the docks, or sightseeing tours. The only agreements relative to availability of equipment for *deplaning* passengers were with United Airlines and Pan American Airways. Agreements with other airlines, Canadian Pacific, Northwest Airlines, B.C.P.A., related only to transportation of crews (R. 125). The manager testified that there were peak periods of arrivals and departures that occurred commencing at 6:30 to 7:00 in the morning and continuing to 9:00 or 10:00 in the morning. A further peak period occurred in late afternoon and evening (R. 95). And the method of operation is well illustrated by the testimony of the Appellees' manager concerning the handling of prepaid or prebooked fares. In answer to a question directed to

ascertain whether preference was given to coupon or charge traffic, the manager testified (R. 107) :

“A. Well, the company policy would naturally be to go out and take care of your prepaid and your prebooked people. However, the way we did it, if a plane were coming in, for example, with 50 people aboard, we would have, let’s say, 8 or 10 prebooked, and we would know that there would probably be a certain percentage of the rest that we would get. So we would send equipment out there on speculation to try and take care of as much of the casual business as possible.”

This is a graphic illustration of the method of the entire operations. With contracts with some airlines, and not with others, with passengers arriving throughout two relatively long peak periods of the morning and early evening, the objective of the business was to get equipment to the airport and take care of as much as possible. This is in complete contrast to the exclusive agreements in the *Airlines Transportation* case.

Further, in *Airlines Transportation* the court tied the beginning and the end of the interstate journey to the Parmelee system, which the Supreme Court, in *Yellow Cab, supra*, had found to be a connecting link in interstate commerce. The court then stated (p. 251) :

“But the arrangement for the carriage of the passengers is made by air line carriers . . .”

In the instant case only two of many carriers had any such arrangement (R. 125); the arrangements pertained only to deplaning passengers (R. 123); and the Hawaii Aeronautics Commission refused to recognize (R. 123) such agreements. Transportation at the ter-

minus of the journey for passengers of the other airlines was therefore left to the passengers to arrange for and employ such facilities as they saw fit, of which those of the Appellees were only one. The arrangements for carriage of prebooked and prepaid passengers here were, in effect, made with travel agents (and some airlines functioning as such), and the Appellees and were not, therefore, in any way part of the contractual arrangement with the carrier as such; moreover, they were not attributable to any agreement with the carrier for availability of transportation. The very fact that the passenger was not obligated to use Appellees' equipment after arrival on any airline with whom Appellees had agreements for availability of equipment further supports the essentially local nature of the transportation offered.¹

Without belaboring the point further, we submit that the District Court properly concluded from all the evidence adduced that the agreements with two airlines at the Honolulu Airport do not establish the foundation of any integration into interstate commerce of a trip by "airporter" to a hotel of the passenger's own choosing.

¹The evidence also shows that Appellees had arrangements with various airlines to provide transportation for crews also. The airporters so provided were at the disposal of the captain of the crew (R. 72, 73, 90). Appellants do not press argument on this factor. Such a factor in Appellees' operations and Appellants' activities are not significant, Appellees submit, in view of the ruling in *McLeod v. Threlkeld*, 319 U.S. 491, 87 L. Ed. 1538. The same ruling appears equally applicable to the isolated and irregular cases of transportation of passengers to hotels on flight returns for engine maintenance.

- D. The fact that the evidence establishes that the "airporters" would pick up or drop passengers virtually anywhere in the Waikiki area, depending upon the accommodation of the streets, further supports the conclusion that this transportation is essentially local in character.

The District Court so concluded and the evidence and the record amply support this conclusion. One of the drivers-Appellants herein testified (R. 78, 79) that the "airporters" would drop as well as pick up passengers throughout the various hotels and apartments in the whole Waikiki district, limited to the extent that they could not go down the small, narrow streets since they could not get the equipment through. It further appears clear that no true distinction can be made by reason of the nature of the equipment since, as the record shows, the equipment was merely an elongated passenger vehicle which would thereby accommodate eleven passengers, utilized as a matter of pure business economics—more passengers carried with fewer drivers (R. 99). In the utilization of the equipment in the Waikiki area as well as at the airport and the docks, dispatching was coordinated with an airport dispatcher as well as a Waikiki dispatcher, who were at the same time coordinating other transportation, including smaller taxicabs to and from hotels and all over Waikiki as well as other equipment at the airport (R. 94). These additional factors further distinguish the facts here presented from those in *Airlines Transportation, supra*, and the equipment and the system of dispatching there used.

E. On the basis of the entire record, the District Court properly found that the employees-Appellants herein are engaged in local operations preceding or following interstate travel and that such operations do not constitute an integral part thereof within the meaning of the Act.

The District Court accepted the ruling in *Cederblade v. Parmelee Transportation Co.*, *supra*, in which the operation of busses between downtown Chicago and the airport, transporting passengers and baggage in both directions, the passengers paying the carrier directly for the fare, was held not interstate commerce and employees engaged therein were not covered by the Act. With respect to the airport bus operations in this case, the court there stated (p. 969), in referring to the decision of the Supreme Court in *United States v. Yellow Cab*, *supra*:

“I think, however, that the real rationale of the opinion [Yellow Cab] lies in the Court’s discussion of the intensely practical concept (of interstate commerce) drawn from the normal and accepted course of business. In this connection, the Court drew the distinction, which I have previously mentioned, between interstation transfer of interstate travelers, which is in the stream of commerce, and hauling passengers to and from stations and terminals, which is a local operation preceding or following the interstate journey and not an integral part thereof.”

Subsequent decisions, we submit have not changed this principle so enunciated and clearly applicable in the instant case. The Secretary of Labor, in his *amicus* brief, makes considerable point of the fact that a later decision of the Supreme Court in *U.S. v. Capital Transit Company*, 338 U.S. 286, 94 L. Ed. 93, effected a mod-

ification of this principle so far as a situation such as here presented is concerned. We disagree. In the majority opinion itself in the *Capital Transit* case, the Supreme Court reaffirmed *Yellow Cab* in stating (page 290) that the decision in *Yellow Cab* was not in conflict with the prior holding in *U.S. v. Capital Transit Co.*, 325 U.S. 357. Nor does the second *Capital Transit* decision, following an obvious attempt on the part of the transit company to avoid the effect of the Court's prior ruling, present a situation in any way analogous to that presented in the instant case. It is apparent from the facts in the second *Capital Transit* case that the passengers there had not *completed* the interstate journey to the *place they* intended to arrive at. That is not the situation presented here, since in common parlance a passenger clearly arrived in Hawaii at the airport or at the dock in Honolulu just as he has arrived in Chicago at the Dearborn Street or any other station. Nor, as we have shown, does the evidence here establish any such contractual arrangements to change this basic fact. Such contracts as there are here have already been clearly distinguished from those in *Airlines Transportation* so that the ruling in that case is not a proper precedent to be applied in this case.

To extend the ruling in *Airlines Transportation* to the situation presented here and find the Appellants herein to be "engaged in commerce" would, we submit, be an unwarranted extension of the reaches of the Act. In *Walling v. Jacksonville Paper Company*, 317 U.S. 564, 87 L. Ed. 460, the Administrator argued for a ruling of interstate commerce coverage not only with respect to goods moving "pursuant to a prior order, con-

tract or understanding," but also with respect to business with customers generally forming a fairly stable group whose orders were recurrent as to the kind and amount of merchandise, the Manager being able to estimate with considerable precision the needs of his trade. The Supreme Court rejected such extension, stating that the Administrator had not sustained the burden, which was on the Petitioner, of establishing error in a judgment which the Court was asked to set aside. The Court concluded that the evidence in support of the Administrator's contention lacked "that particularity necessary to show that the goods in question were different from goods acquired and held by a local merchant for local disposition." Similarly, we submit that the Appellants are here asking an unwarranted extension of the Act which would violate that "intensely practical concept drawn from the normal and accepted course of business," which fundamental principle still obtains.

CONCLUSION.

On the basis of the foregoing, we submit that the rulings and the judgment of the District Court should be affirmed.

Dated, Honolulu, Hawaii,
November 17, 1956.

Respectfully submitted,
ERNEST C. MOORE, JR.,
Attorney for Appellees.

MOORE, TORKILDSON & RICE,
Of Counsel.

No. 15229

United States
Court of Appeals
for the Ninth Circuit

STEPHEN G. ACHONG,

Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

FILED

JAN 18 1957

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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The Tax Court of the United States

Docket No. 33319

STEPHEN G. ACHONG, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPEARANCES

For Petitioner:

Samuel P. King, Esq.

E. R. Cameron, Esq.

Herbert C. Dunn, Esq.

For Respondent:

E. A. Tonjes, Esq.

DOCKET ENTRIES

1951

Apr. 2—Petition received and filed. Taxpayer notified. Fee paid.

Apr. 3—Copy of petition served on General Counsel.

Apr. 2—Request for Circuit hearing in Honolulu, filed by taxpayer. 4/13/51—Granted.

May 14—Answer filed by General Counsel.

May 17—Copy of answer served on taxpayer, Honolulu, T. H.

1954

May 7—Hearing set July 9, 1954, Honolulu, T. H.

May 24—Notice changing hearing date to July 15, 1954, Honolulu, T. H.

1954

July 22—Hearing had before Judge LeMire on the merits; Appearance of Herbert C. Dunn, filed. Stipulation of Facts filed; Petitioner's Brief due Sept. 22, 1954; Respondent's Brief due Nov. 8, 1954; Petitioner's Reply Brief due Dec. 8, 1954.

Aug. 30—Transcript of Hearing 7/15/54 and 7/22/54 filed.

Sept. 23—Motion for extension to Oct. 22, 1954, to file brief filed by Petitioner. Granted.

Oct. 25—Brief filed by taxpayer. Copy served.

Dec. 8—Brief filed by General Counsel.

1955

Jan. 14—Motion for extension to Jan. 14, 1955, to file the attached reply brief, brief lodged, filed by taxpayer. 1/17/55—Granted.

Jan. 18—Copy of motion and reply brief served on General Counsel.

1956

Mar. 26—Memorandum findings of fact and Opinion filed, Judge LeMire. Decision will be entered for the Respondent. 3/27/56 Copy served.

Mar. 27—Decision entered, Judge LeMire, Div. 5.

June 26—Bond in the amount of \$24,000.00, approved and filed.

June 26—Petition for Review by U. S. Court of Appeals for the Ninth Circuit with assignments of error filed by Petitioner.

1956

June 26—Notice of filing petition for review, with proof of service thereon, filed.

June 26—Designation of contents of record on appeal and Praecipe for Record, with proof of service thereon, filed.

[Title of Tax Court and Cause.]

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (bureau symbols IT : FC : LMJ : 150D) dated March 14, 1951, and as a basis of his proceeding alleges as follows:

I.

The petitioner is an individual, a citizen of the United States, and a resident of the City and County of Honolulu, Territory of Hawaii. His home address is 45-503 Kamehameha Highway, Kaneohe, Hawaii. The income tax returns for the years here involved were filed with the Collector of Internal Revenue, District of Hawaii, at Honolulu, Hawaii.

II.

The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on March 14, 1951.

III.

The deficiencies as determined by the Commissioner of Internal Revenue are in income taxes for the calendar years 1946 and 1947 in the amounts of \$10,799.76 and \$1,105.69, respectively, a total of \$11,905.45, of which \$11,721.41 is in dispute.

IV.

The determinations of the taxes set forth in the said notice of deficiency are based upon the following errors:

A. The Commissioner of Internal Revenue has erred in determining that the petitioner's homestead, a substantial portion of which was sold during the calendar years 1946 and 1947, had been held by him primarily for sale to customers in the ordinary course of his trade or business, and in failing to determine, instead, that the said land was a capital asset.

B. The Commissioner of Internal Revenue has erred in determining that the gains realized by the petitioner from sales of a substantial portion of his homestead during the calendar years 1946 and 1947 were ordinary income, and in failing to determine, instead, that the said gains were long-term capital gains.

C. The Commissioner of Internal Revenue has erred in determining that there are deficiencies of \$10,799.76 and \$1,105.69, respectively, in the petitioner's returns of income taxes for the calendar years 1946 and 1947, and in failing to determine, instead, that there is a deficiency of \$184.04 in the

petitioner's return of income tax for the calendar year 1946 and that petitioner's original return of income tax for the calendar year 1947 was correct.

V.

The facts upon which the petitioner relies as the basis of this proceeding are as follows:

A. The petitioner is a citizen of the United States, is unmarried, and resides at 45-503 Kamehameha Highway, City and County of Honolulu, Territory of Hawaii. Throughout the calendar years 1946 and 1947, petitioner was employed full time by Metropolitan Market No. 1, City of Honolulu, as a cashier. He had no office or place of business of his own.

B. Petitioner duly filed with the Collector of Internal Revenue, District of Hawaii, Honolulu, Hawaii, his individual income tax return for the calendar year 1946. The said return disclosed an adjusted gross income of \$23,577.94 in the determination of which there was taken into account 50 per centum, viz., \$17,271.40, of a long-term capital gain of \$34,542.80, which he determined originally he had realized from sales of real property. The petitioner elected the standard deduction. Upon a net income of \$23,077.94, his income tax liability was \$8,284.93, which he duly paid to the Collector aforesaid.

C. The petitioner duly filed with the Collector aforesaid his individual income tax return for the calendar year 1947. The said return disclosed an adjusted gross income of \$9,201.04 in the determina-

tion of which there was taken into account 50 per centum, viz., \$3,252.20, of a long-term capital gain of \$6,504.39, which was realized from sales of real property. The petitioner elected the standard deduction. Upon a net income of \$8,701.04, his income tax liability was \$1,926.93, which he duly paid to the Collector aforesaid.

D. Pursuant to the provisions of the Revised Laws of Hawaii, 1915, governing the transfer of land for homestead purposes, the Petitioner purchased from the Territory of Hawaii, in consideration of \$750.00 and for use as a homestead, 11.6 acres of land included in the Halekou-Waikalua-kai Homesteads, District of Koolaupoko, County of Honolulu, and otherwise designated 45-503 Kamehameha Highway, Kaneohe, Oahu, Territory of Hawaii.

E. Petitioner immediately erected a dwelling upon the homestead land aforesaid and has occupied the said dwelling continuously as his home, since 1923.

F. Immediately after acquiring the homestead land aforesaid, and continuously thereafter until employment conditions which arose out of the prosecution of World War II, caused him to discontinue farming, the petitioner farmed his homestead land as an enterprise for profit. Subsequently to terminating his farm operations, and until its subdivision in 1946, petitioner rented the arable portion of his homestead lands for farming.

G. During 1946, Samuel W. King, a realtor and dealer in real estate, asked the petitioner if he

would sell the portion of the homestead land which the petitioner was not occupying for residential purposes and which was rented. The said dealer pointed to the meager returns which petitioner was receiving as rent. Petitioner granted to Samuel W. King, aforesaid, an option either to purchase en bloc or to subdivide and sell the homestead land aforesaid, reserving, however, the first 300 feet of the property fronting on Kamehameha Highway, which reservation included the petitioner's dwelling. If realtor King elected to subdivide and sell the parcel of land aforesaid it was provided that he should secure the approval of any governmental agencies having jurisdiction over the contemplated sale; that he should hire and supervise surveyors and contractors as needed for preliminary planning and for putting the property in condition for sale in accordance with any approved plan of subdivision; that he should prepare all necessary documents, contracts, deeds, and other instruments in connection therewith; that he should pay as his own all costs of promotion, advertising, and all other costs necessary for the actual sale of the property; that he should prepare the necessary documents attendant upon all sales, make collections and receive payments on account of all sales, and act as escrow agent for the delivery of papers in connection with all sales; and that he should keep complete records and books of account pertaining to the contemplated project; et cetera. Only the costs of subdivision were to be borne by the petitioner.

H. Realtor Samuel W. King elected the second

alternative and contracted to subdivide, pursuant to the Revised Ordinances of Honolulu, 1942, the 11.6 acres of land which comprised the petitioner's homestead. King caused the land to be surveyed, mapped, and platted for subdivision into thirty-three (33) lots, three (3) of which comprised the homesite land that was reserved by the petitioner. Realtor King filed, on August 1, 1946, with the City Planning Commission, City and County of Honolulu, an application for the subdivision of the petitioner's homestead. The application was approved on the date it was filed.

I. The Revised Ordinances of Honolulu, 1942, provided that a subdivider of rural land need install only necessary streets and water mains, including fire hydrants. Sewers, sidewalks, and electric and gas utilities were not required.

J. During the months of August, September, October and November, 1946, Realtor King, without advertising of any kind or sort, without erecting signs upon the property, and before construction of roads, water mains and fire hydrants, received and accepted offers from persons who lived in the neighborhood of the proposed subdivision, to purchase, subject to the installation of water mains and the construction of a road, all thirty (30) lots which he had been authorized to sell. The petitioner gave none of his time or attention to negotiating the said sales.

K. Samuel W. King, on October 26, 1946, entered into a contract with Paul Low Engineering & Construction Company for the installation of a

water main, fire hydrants, and a blind road connecting with Kamehameha Highway and bisecting the rectangular parcel of homestead land. The construction work was completed and accepted early in 1947.

L. Petitioner elected, in his individual income tax returns for the calendar years 1946 and 1947, to return on the installment basis the gains realized from sales of his homestead land.

M. The corrected long-term capital gain realized by the petitioner during the calendar year 1946 from sales of his homestead land was \$35,199.48, only 50 per centum of which should be taken into account in computing his net income for the calendar year 1946. The long-term capital gains realized by petitioner during the calendar year 1947 from the same source was \$6,504.39, only 50 per centum of which should be taken into account in computing his net income for the calendar year 1947.

N. Petitioner acquired the homestead in 1923 as a homesite and for investment. The homestead land which was sold as aforesaid was not property held by the petitioner primarily for sale to customers in the ordinary course of his trade or business.

O. Throughout the calendar years 1946 and 1947, the petitioner gave his full time serving as cashier of Metropolitan Market No. 1 within the city limits of Honolulu. He was not a dealer in real property at any time during the calendar years aforesaid; he had no private office or place of business.

P. Neither before 1946 nor after 1947, has the petitioner held real property for sale, nor has he sold real property, excepting the homestead land aforesaid.

Q. The homestead land which the petitioner acquired in 1923 and which he sold in part during 1946 and 1947 was a capital asset as defined in section 117(a)(1), I.R.C., and the gains realized during the calendar years 1946 and 1947 from its sale were long-term capital gains only 50 per centum of which should be taken into account in computing the petitioner's net capital gain for each of the taxable years stated.

R. The Commissioner has determined that the homestead land which was acquired and sold as aforesaid was property held by the petitioner for sale to customers in the ordinary course of petitioner's trade or business, and has included in the petitioner's gross and net incomes for the calendar years 1946 and 1947, respectively, 100 per centum of the gains realized during each of the said years from sales of said realty.

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that the homestead land which the petitioner sold during 1946 was a capital asset; that the gains realized during the calendar years 1946 and 1947 from sales of the said land were long-term capital gains; that only 50 per centum of the said gains should be taken into account in determining petitioner's net capital gains and net incomes for the taxable years

aforesaid; that there is a deficiency of \$184.04 in petitioner's return of income tax for the calendar year 1946; but that there is no deficiency in petitioner's return of income tax for the calendar year 1947.

/s/ SAMUEL P. KING,

/s/ E. R. CAMERON,

Counsel for Petitioner

Duly Verified.

EXHIBIT A

Form 1230

SN-IT-1

Treasury Department, Internal Revenue Service,
P. O. Box 421, Honolulu 9, Hawaii

Office of Internal Revenue Agent in Charge, Honolulu Division, 560 Alexander Young Building.

In reply refer to IT:FC:LMJ:150D

Mr. Stephen G. Achong,
45-503 Kamehameha Highway,
Kaneohe, Oahu, T. H.

March 14, 1951

Dear Sir:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1946, and December 31, 1947, discloses a deficiency of \$11,905.45, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 150 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia

as the 150th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, P. O. Box 421, Honolulu 9, T. H., for the attention of IT:FC:LMJ. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner

/s/ By H. A. PETERSON,

Internal Revenue Agent in Charge

Enclosures: Statement, Form 1276, Form of waiver.

Statement

Mr. Stephen G. Achong, 45-503 Kamehameha Highway, Kaneohe, Oahu, T. H.

Year	Deficiency
1946	\$ 10,799.76
1947	1,105.69
	<hr/>
Total	\$ 11,905.56

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated May 29, 1950, to your protest dated December 8, 1950, and to the statements made at the conference held on February 27, 1951.

A copy of this letter and statement has been mailed to your representative, Mr. S. A. Goff, c/o Cameron, Tennent & Greaney, P. O. Box 3556, Honolulu 11, T. H., in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1946

Adjustments to Net Income

Net income as disclosed by original return.....	\$ 23,077.94
Unallowable deductions and additional income:	
(a) Gain from sale of lots	35,199.48
	<hr/>
Total	\$ 58,277.42
Nontaxable income and additional deductions:	
(b) Net long-term capital gains	17,271.40
	<hr/>
Net income adjusted	\$ 41,006.02

Explanation of Adjustments

(a) In your income tax return for the calendar year 1946 you have reported gain of \$34,542.80 from the sale of lots which you treated as long-term capital gain for income tax purposes and took into net income to the extent of 50% thereof, or \$17,271.40.

It is held that the correct amount of gain realized on the sale of the lots was \$35,199.48. It is further held that the lots sold were at the time of

sale held for sale to customers in the ordinary course of a trade or business within the meaning of section 117(a)(1)(A) of the Internal Revenue Code, and that the gain is taxable as ordinary income, and not as capital gain.

(b) Gain from sale of lots improperly reported as net long-term capital gain is eliminated.

Computation of Tax

Net income adjusted	\$ 41,006.02
Less: Exemption	500.00
<hr/>	
Balance subject to tentative normal tax and surtax.....	\$ 40,506.02
<hr/>	
Tentative normal tax and surtax on \$40,506.02.....	\$ 20,089.15
Less: 5% of \$20,089.15	1,004.46
<hr/>	
Correct income tax liability.....	\$ 19,084.69
Income tax liability disclosed by original return:	
Account No. 300386	8,284.93
<hr/>	
Deficiency in income tax.....	\$ 10,799.76

Taxable Year Ended December 31, 1947

Adjustments to Net Income

Net income as disclosed by return.....	\$ 8,701.04
Unallowable deductions and additional income:	
(a) Gain from sale of lots.....	6,504.39
<hr/>	
Total	\$ 15,205.43
Nontaxable income and additional deductions:	
(b) Net long-term capital gains	3,252.20
<hr/>	
Net income adjusted	\$ 11,953.23

Explanation of Adjustments

(a) In your income tax return for the calendar year 1947 you have reported gain of \$6,504.39 from the sale of lots which you treated as long-term

capital gain for income tax purposes and took into net income to the extent of 50% thereof, or \$3,-252.20. It is held that the lots sold were at the time of sale held for sale to customers in the ordinary course of a trade or business within the meaning of section 117(a)(1)(A) of the Internal Revenue Code, and that the gain is taxable as ordinary income, and not as capital gain.

(b) Gain from sale of lots improperly reported as net long-term capital gain is eliminated.

Computation of Tax

Net income adjusted	\$ 11,953.23
Less: Exemption	500.00
	<hr/>
Balance subject to tentative normal tax and surtax.....	\$ 11,453.23
	<hr/>
Tentative normal tax and surtax on \$11,453.23.....	\$ 3,192.23
Less: 5% of \$3,192.23	159.61
	<hr/>
Correct income tax liability.....	\$ 3,032.62
Income tax liability disclosed by return,	
Account No. 300330	1,926.93
	<hr/>
Deficiency in income tax.....	\$ 1,105.69

[Endorsed]: T.C.U.S. Filed April 2, 1951.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed

by the above petitioner, admits and denies as follows:

I. and II.

Admits the allegations contained in paragraphs I and II of the petition.

III.

Admits that the deficiencies as determined by the Commissioner of Internal Revenue are income taxes for the calendar years 1946 and 1947 in the amounts of \$10,799.76 and \$1,105.69, respectively, a total of \$11,905.45; denies for lack of information the remaining allegations contained in paragraph III of the petition.

IV.

A to C, inclusive. Denies the allegations of error contained in paragraph IV, A to C, inclusive, of the petition.

V.

A. Admits the allegations contained in the first sentence of paragraph V, A of the petition; denies for lack of information the remaining allegations contained in said paragraph.

B. Denies for lack of information the allegations contained in the last sentence of paragraph V, B of the petition; admits the remaining allegations contained in said paragraph.

C. Denies for lack of information the allegations contained in the last sentence of paragraph V, C of the petition; admits the remaining allegations contained in said paragraph.

D to K, inclusive. Denies for lack of informa-

tion the allegations contained in paragraph V, D to K, inclusive, of the petition.

L. Admits that petitioner elected, in his individual income tax returns for the calendar years 1946 and 1947, to return on the installment basis the gains realized from sales of land; denies the remaining allegations contained in paragraph V, L of the petition.

M to R, inclusive. Denies the allegations contained in paragraph V, M to R, inclusive, of the petition.

VI.

Denies generally and specifically each and every allegation in the petition not hereinbefore admitted or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES OLIPHANT,
Chief Counsel, Bureau of
Internal Revenue

Of Counsel:

B. H. Neblett, Division Counsel,
T. M. Mather, Charles W. Nyquist, Special
Attorneys, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed May 14, 1951.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed that:

I.

The petitioner is an individual, 67 years old (born October 28, 1887), unmarried, a citizen of the United States, and a resident of the City and County of Honolulu, Territory of Hawaii. His home address is 45-503 Kamehameha Highway, Kaneohe, Oahu, Territory of Hawaii. The income tax returns for the years here involved were filed with the (then) Collector of Internal Revenue, District of Hawaii, at Honolulu, Hawaii.

II.

The notice of deficiency, a copy of which is attached to the petition as Exhibit A, was mailed to the petitioner on March 14, 1951.

III.

The deficiencies as determined by the Commissioner of Internal Revenue are in income taxes for the calendar years 1946 and 1947 in the amounts of \$10,799.76 and \$1,105.69, respectively, a total of \$11,905.45, of which \$11,721.41 is in dispute. For the calendar year 1946 the taxpayer reported and paid a tax of \$8,284.93 and the Commissioner of Internal Revenue claims a tax of \$19,084.69. For the calendar year 1947 the taxpayer reported and paid a tax of \$1,926.93 and the Commissioner of

Internal Revenue claims a tax of \$3,032.62. Petitioner admits an additional tax for the calendar year 1946 of \$184.04.

IV.

On August 17, 1923, petitioner was issued a deed, Land Patent No. 8277 (Exhibit 2), to 11.63 (11.55 net) acres of government land at Halekou-Waikalukai Homesteads, Koolaupoko, Oahu, Territory of Hawaii, pursuant to Special Homestead Agreement No. 1170 (Exhibit 1), in accordance with the provisions of Section 73 of the Hawaiian Organic Act and Sections 352, et seq., of the Revised Laws of Hawaii 1915.

V.

In 1915 petitioner erected a dwelling on the said homestead land and has occupied the said dwelling as his home continuously from 1915 to the present time.

VI.

From time to time during the period from the date of Special Homestead Agreement No. 1170 (Exhibit 1) until 1946 petitioner leased portions of the said homestead land to various tenants under short term tenancy agreements for farming purposes.

VII.

Petitioner was employed full time as a cashier by Metropolitan Meat Market No. 1, Honolulu, from 1914 until his retirement in 1950. During this period and up to the present time, he has never held any other job or had any other employment.

He has never had any office or place of business of his own. He has never owned or held title to any real property other than the above described homestead land.

VIII.

In 1946, Samuel W. King, a real estate broker and dealer in land, asked petitioner if petitioner would sell all or any portion of the said homestead land. After several discussions petitioner and Samuel W. King entered into a written agreement dated June 27, 1946, relative to the sale of this land (Exhibit 3). Immediately thereafter Samuel W. King opened an account in his books in the name of petitioner.

IX.

Pursuant to the said agreement (Exhibit 3), Samuel W. King prepared a proposed subdivision of the homestead land in accordance with the Revised Ordinances of the City and County of Honolulu 1942 and the Revised Laws of Hawaii 1935. This proposed subdivision, (Exhibit 4), was approved by petitioner and on August 1, 1946, was given Preliminary Approval, and on January 15, 1948, Final Approval, by the City Planning Commission of the City and County of Honolulu as required by law.

X.

The applicable ordinances of the City and County of Honolulu and the applicable laws of the Territory of Hawaii provided that a subdivider of rural land need install only necessary streets and water mains, including fire hydrants. Sewers, sidewalks,

and electric and gas utilities were not required by law.

XI.

In connection with the preparation of the afore-said plan of subdivision and the construction of the required improvements, and acting under the agreement of June 27, 1946, and with the approval of petitioner, Samuel W. King retained the Paul Low Engineering and Construction Company. On August 24, 1946, this engineering firm submitted an estimate of construction items (Exhibit 5). On October 22, 1946, Samuel W. King and the Paul Low Engineering and Construction Company entered into a written agreement approved by petitioner for the construction of the necessary improvements (Exhibit 6). Costs of the survey, subdivision, construction and file plans, and final staking out were charged and paid for separately (Exhibit 7). The required improvements contracted for were completed and accepted in February, 1947, and the roadway was conveyed to the Territory of Hawaii on December 5, 1949.

XII.

Payments to the Paul Low Engineering and Construction Company were billed to and made by Samuel W. King in accordance with the terms of the contract between them (Exhibit 6) as follows:

- Payment (a) of \$6,400.00 on November 25, 1946;
- Payment (d) of \$1,600.00 on December 11, 1946;
- Payment (b) of \$6,400.00 on January 14, 1947;
- Payment (c) of \$6,400.00 on January 31, 1947;

Half of payment (c) or \$4,000.00 on December 22, 1947;

The balance of payment (e) or \$4,000.00 on January 14, 1948;

Final payment (f) of \$3,200.00 on January 29, 1948.

The charge for surveying, et cetera (Exhibit 7) was billed to and paid by Samuel W. King as follows:

\$2,700.00 on November 14, 1946; and \$300.00 on February 17, 1947.

All payments were charged to the account of petitioner in the books of Samuel W. King.

XIII.

In the approved subdivision (Exhibit 4), Lots 16, 32 and 33 were reserved by petitioner and are still unsold. Lot 16 was and is set aside as petitioner's own residential lot and includes the dwelling occupied by petitioner. Lots 32 and 33 were and are reserved for possible future business use. All of the remaining lots were sold as set forth below.

XIV.

Following the execution of the agreement of June 27, 1946 (Exhibit 3), Samuel W. King had certain forms prepared to be used in connection with the sale of lots in the proposed subdivision, called the Puahuula Subdivision. These forms included a Deposit Receipt and Contract (Exhibit 8), Deed and Mortgage. During the period July 18, 1946 to November 19, 1946, Deposit receipt and

Contract forms were executed by purchasers for all 30 lots offered for sale. Some of these original contracts were modified or cancelled as detailed below.

XV.

The detailed history of the sale of each lot is as follows:

Lot No.	Purchaser	Date of Deposit Receipt and Contract	Date of Deed
1.	Mercado.....	7/26/46	11/25/46
2.	Carvalho.....	8/10/46	11/19/46
3.	Quon.....	8/16/46	11/25/46
4.	Brandt.....	8/17/46	11/25/46
5.)	Cypher, G.....	8/23/46	11/19/46
6.)			
7.	Forde.....	9/10/46	11/19/46
8.	Keane.....	8/17/46	11/19/46
9.	Cazinha.....	8/19/46	11/25/46
10.)	Luke.....	8/13/46	11/19/46
11.)			
12.	Yasuda.....	8/11/46	11/19/46
13.	Ridenour.....	8/17/46	12/ 5/46
14.	Keene.....	8/10/46	11/19/46
15.	Li.....	8/10/46	11/19/46
16.	Reserved as Petitioner's Residence.		
17.	Won, P.....	8/10/46	11/19/46
18.)	Achong, H.....	8/17/46	Cancelled
19.)			11/18/46
18.	Achong, H.....	11/18/46	11/25/46
19.	Halualani.....	11/19/46	11/25/46
20.	Yamane.....	8/17/46	Cancelled
			11/12/46
20.	Halualani.....	11/14/46	11/25/46
21.	Navarro.....	8/27/46	12/10/46
22.	Cypher, C.....	8/27/46	11/25/46
23.	Tobalado.....	9/ 4/46	11/19/46
24.	Munn.....	9/10/46	11/19/46
25.)	Ross.....	8/14/46	Cancelled
26.)			12/28/46
25.	King, P.....	5/ 1/47	5/27/47

Lot No.	Purchaser	Date of Deposit Receipt and Contract	Date of Deed		
26.	Tanioka.....	6/ 4/48	4/14/48		
27.)	Murabayashi.....	7/18/46	11/19/46		
28.)					
29.	Won, J.....	8/26/46	11/19/46		
30.)	McPherson.....	7/26/46	11/19/46		
31.)					
32.)	Reserved for possible future business use.				
33.)					

XVI.

The details of the terms of sale of and payments for each lot are as follows:

Lot No.	Price	Total Deposit	Balance
1.	\$4,200	\$1,050	Mtge 11/25/46
2.	3,465	350	Cash 11/ 8/46
3.	3,519	1,850	Cash 11/25/46
4.	3,548	1,000	Mtge 11/25/46
5.)	7,178	1,800	Mtge 11/19/46
6.)			
7.	3,133	783.50	Mtge 11/19/46
8.	3,653	913	Mtge 11/19/46
9.	3,688	370	Cash 1/14/47
10.)	7,458	740	Cash 11/ 7/46
11.)			
12.	3,770	380	Cash 11/19/46
13.	3,800	380	Cash 12/16/46
14.	3,825	3,285	Note 11/19/46
15.	3,855	1,850	Cash 11/ 7/46
16.	Reserved		
17.	3,240	810	Mtge 11/19/46
18.	3,466	866.50	Mtge 11/25/46
19.	4,700	1,175	Mtge 12/11/46
20.	4,740	1,180	Mtge 11/25/46
21.	3,588	897	Mtge 12/10/46
22.	3,620	365	Mtge 11/25/46
23.	3,557	890	Mtge 11/19/46
24.	3,222	795.50	Cash 12/29/46
25.	4,996		Cash 5/ 2/47

Lot No.	Price	Total Deposit	Balance
26.	4,996	1,660	Mtge 6/16/48
27.)	7,590	750	Cash 11/ 4/46
28.)			
29.	3,840	960	Mtge 11/19/46
30.)	7,780	700	Cash 11/13/46
31.)			
32.)	Reserved		
33.)			

XVII.

The details of the purchase money mortgages outstanding during the calendar years 1946 and 1947 are as follows:

Lot No.	Amount of Mortgage	Monthly Payment (Inc. Int.)	— Paid in 1947 —	
			Prin.	Int.
1.	\$3,150	\$50.00	\$ 148.52	\$151.66
4.	2,548	50.00	442.36	107.64
5.)	5,378	60.00	1,278.41	215.61
6.)				
7.	2,349.50	50.00	449.70	110.62
8.	2,740	40.00	321.04	118.96
14.	540 (note)	50.00	540.00	13.09
17.	2,430	50.00	447.87	102.13
18.	2,599.50	50.00	439.96	110.04
19.	3,525	50.00	375.00	115.96
20.	3,560	50.00	375.00	153.60
21.	2,691	50.00	428.69	126.31
22.	3,255	50.00	622.94	67.06
23.	2,667	50.00	764.55	95.35
26.	3,336	50.00	-----	-----
29.	2,880	50.00	374.79	125.21

There were no mortgage payments during the calendar year 1946.

XVIII.

Total costs incurred under the agreement of June 27, 1946 (Exhibit 3) as of December 31, 1946, were as follows:

Construction of improvements: \$32,000.00.

Survey, plans, staking: \$3,000.00.

Legal expense: \$200.00.

Certificate of title: \$30.00.

Blue prints of tract: \$7.85.

Stamp taxes: \$123.00.

Deeds: \$230.00.

Acknowledgments: \$25.00.

Sales commissions: \$10,443.50.

Additional costs thereafter included only sales commissions, cost of papers, revenue stamps, certificates of title, notary fees, legal and accounting fees.

XIX.

All sales were made by Samuel W. King without any advertising of any kind. No signs were erected on the property. Samuel W. King maintained a real estate office which indicated that he had property of the type herein involved for sale. The lots were sold through the activities of Samuel W. King by either contacting persons whom he believed to be prospective purchasers or by Samuel W. King suggesting to prospective purchasers who contacted him that the lots in question were for sale. Petitioner took no part in negotiating any of the said sales. Purchasers were for the most part relatives or friends living in the Kaneohe area (where the homestead is located). The purchasers of Lots 2, 15, 17, 18, and 29 are related to petitioner by blood or marriage. The purchasers of Lots 8, 14, and 25 are related to Samuel W. King by marriage. All lots were sold on Deposit Receipt

and Contract forms before any subdivision improvements were constructed, but on the representation that improvements would be constructed. Samuel W. King received all payments, processed all papers, and made all disbursements, crediting and debiting petitioner's account in the books of Samuel W. King as appropriate, and rendering periodic statements to petitioner. While none of the proceeds have been actually turned over to petitioner, all proceeds were credited to the account of petitioner and Samuel W. King has invested the net amount thereof for petitioner.

XX.

Petitioner elected, in his individual income tax returns for the calendar years 1946 and 1947, to return on the installment basis the gains realized from sales of his homestead land. In his income tax return for the calendar year 1946, he reported a gain from the sale of his homestead land of \$34,542.80. The Commissioner has determined that the correct amount of gain was \$35,199.48. Petitioner admits that the correct amount of gain for the calendar year 1946 was \$35,199.48.

/s/ SAMUEL P. KING,
/s/ HERBERT C. DUNN,
Counsel for Petitioner
/s/ DANIEL A. TAYLOR,

Counsel for Respondent, Chief Counsel, Internal
Revenue Service

[Endorsed]: T.C.U.S. Filed July 22, 1954.

[Title of Tax Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

District Court, Federal Building, Honolulu, T.H.,
Thursday, July 15, 1954

The above-entitled matter came on for hearing, pursuant to notice to the parties, at 10:10 o'clock a.m.

Before: Honorable C. P. LeMire, J., Presiding.

Appearances: Samuel P. King, Esq., and Herbert G. Dunn, Esq., for the petitioner. E. A. Tonjes, Esq., Donald P. Chehock, Esq., and R. E. Maiden, Jr., Esq. (Hon. Kenneth W. Gemmill, Acting Chief Counsel, Bureau of Internal Revenue), for the Respondent.

The Clerk: The case of Stephen G. Achong, No. 33319.

Mr. King: Samuel P. King, and Herbert G. Dunn, for the petitioner.

Mr. Tonjes: E. A. Tonjes, for the respondent.

The Court: That case is for trial, gentlemen?

Mr. King: Yes, sir.

The Court: How much time do you anticipate?

Mr. King: We were only planning to bring in one witness, Mr. Achong, himself.

The Court: An hour or so?

Mr. King: An hour, maximum, I should say.

The Court: Very well, gentlemen, we will set the case for hearing following the recess and after the calendar call.

(Thereupon, at 10:12 o'clock a.m., the hearing in the above-entitled petition was recessed, to reconvene after the calendar call.)

District Court, Federal Building, Honolulu, T. H.,
Thursday, July 22, 1954

The above-entitled matter came on for further hearing, pursuant to adjournment, at 9:00 o'clock a.m.

* * * * *

The Clerk: The appeal of Stephen G. Achong; Mr. Samuel P. King, Esq., Post Office Box 3556, Honolulu 11, T. H., for the petitioner; and for the Respondent, Mr. E. A. Tonjes.

The Court: Very well, gentlemen, I will be glad to have the parties make a statement of the issues and facts in the case.

Mr. King: We have stipulated upon most of the facts, your Honor, and only one witness to present. Mr. Tonjes has the stipulations.

Mr. Tonjes: Yes, if your Honor please, and I will file it with the Court at this time. These consist of fourteen pages, and quite a few exhibits—eight exhibits.

The Court: What are the numbers of the exhibits?

Mr. Tonjes: Eight, your Honor.

The Court: I want to get the lettering on them. They will be Exhibit A through—

Mr. Tonjes: They are just designated by number, your Honor.

The Court: They are numbered Exhibit 1, 2—

Mr. Tonjes: 1 to 8.

The Court: Very well, the stipulation with the exhibits, 1 through 8, received in evidence.

Mr. King: May I correct my statement?

There is a ninth exhibit, but it is Exhibit A to the notice of deficiency attached to the petition, and it is called Exhibit A.

The Court: Very well, you may proceed with your statement.

Mr. King: Thank you, your Honor.

(Said stipulation and exhibits attached thereto admitted in evidence and made a part of this record.),

Opening Statement on Behalf of Petitioner

Mr. King: The issue is a very narrow one, as far as the point of law is concerned, your Honor, and it is: Whether or not certain gain from the sale of real estate property in 1946 and 1947 constituted ordinary gain or capital gain?

Of course, the issue depends upon the facts, and we have stipulated in this stipulation just filed as to most of the facts concerned, concerning how the real property was sold, to whom it was sold, how the land was cut up for the purpose of sale, what the prices of the sales were, when the sales were made, how much the deposit was, whether the balance was paid by mortgage or by cash, and when the payments were made, and so forth, and the only issue left, not stipulated to, to produce the deficiency, we will have testimony about, concerning the character of the land, before he sold it, why

he sold it, and who determined how it was going to be sold.

Maybe Mr. Tonjes has something to add to that.

Mr. Tonjes: I have nothing to add to that, your Honor. I think substantially all of the material facts are in the stipulation.

The Court: I see.

Mr. Tonjes: And the position of the Respondent is that—it is our contention that the lots were not held for sale by the taxpayer in the ordinary course of business and, therefore, constitute ordinary income.

The Court: Very well. You may call your first witness:

STEPHEN G. ACHONG

the petitioner, was called as a witness for and on his own behalf and, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you tell us your name?

The Witness: Stephen G. Achong.

Direct Examination

Q. (By Mr. King): Mr. Achong, you are a citizen of the United States? A. Yes.

Q. You are the petitioner in this case?

A. Yes, sir.

Q. Now, we have already stipulated, Mr. Achong, concerning most of the facts of this case.

You did own a homestead?

A. Yes, sir.

Q. In Kaneohe? A. Yes, sir.

(Testimony of Stephen G. Achong.)

Q. And you first acquired that homestead in 1915? A. 1914.

Q. When you first acquired that homestead, Mr. Achong, what was the land being used for?

A. Agriculture.

Q. Agricultural lands? A. Yes.

Q. Will you speak up a little more, please, so we can all hear you?

Were there any crops growing on this homestead when you acquired it in 1914?

A. No, it was all wild land.

Q. Did you move on the land shortly after you acquired it? A. In 1915.

Q. You moved on the land in 1915?

A. Yes, sir.

Q. Did you thereafter plant or have anyone plant any crops on that land?

A. Yes, from then on after 1915, after we had the place cleaned up.

Q. And what crops did you plant on the land, to begin with?

A. Well, papayas, and potatoes, and all that stuff—all small garden stuff.

Q. What was the first crop after you moved on?

A. Sweet potatoes.

Q. What year was that?

A. Along about 1918.

Q. Were there any pineapples planted on that land?

A. Yes, sir; in 1920, I think we started planting pineapples.

(Testimony of Stephen G. Achong.)

Q. To begin with, you say you planted the land to papayas and sweet potatoes, and what else?

A. Cabbage; a garden for my home use—truck garden.

Q. Truck garden? A. Yes, sir.

Q. Did you, yourself, farm the land or have somebody else farm it for you?

A. I had somebody else.

Q. You hired people to do that?

A. Yes, sir.

Q. Did you lease the land out for farming?

A. At one time.

Q. That was by hired hand?

A. By hired hand.

Q. Did the planting of crops on your land continue from 1915 up until—when?

A. Up into 1930.

Q. What happened in 1930?

A. The land rested.

Q. It was idle? A. Idle.

Q. You were living on the land at all times; is that right? A. At all times.

Q. When the land became idle in 1930; how long did it remain idle?

A. It remained idle until about 1940.

Q. You planted nothing on the land?

A. Nothing at all.

Q. Did you lease it at all for any purpose, during that period? A. No.

Q. You did nothing with it? A. No.

Q. Just lived on it? A. Yes.

(Testimony of Stephen G. Achong.)

Q. In 1940, what did you do with the land?

A. Well, I started leasing it out.

Q. For what purpose?

A. To small farmers.

Q. How long did that continue?

A. That continued about five years, I think.

Q. Did that continue up until the time you sold the land?

A. Yes.

Q. 1946?

A. 1946.

Q. And what was planted on the land in the period from 1940 to 1946?

A. Various crops, some potatoes, yams, papayas, cabbage, small garden truck.

Q. During this period from 1940 to 1946, was all of the land planted to agricultural crops, or just a portion of it?

A. Just a portion of it.

Q. Was that the same portion, or did you move around from one portion to another?

A. No, the same portion.

Q. This whole homestead amounted to about eleven and one-half acres?

A. Yes, sir.

Q. During the period of 1940 to 1946, about how much of it was planted in agricultural crops?

A. I would say about eight acres.

Q. What did you do with the balance of the land that was not planted in agricultural crops, during the period of 1940 to 1946?

A. Just let it rest.

Q. You were living on a portion of it?

A. On a portion of it.

(Testimony of Stephen G. Achong.)

The Court: Was that portion he did not rent the part he was living on?

Q. (By Mr. King): Was that portion you were living on—did you rent that? A. No.

Q. To whom did you rent your land during the period of 1940 to 1946?

A. Well, to the Benjamin Parker School, and a Japanese named Yamoshito.

Q. How much of the approximately eight acres was rented to Benjamin Parker School?

A. About four acres.

Q. About four acres to each; is that about right? A. Four acres to each.

Q. The Benjamin Parker School used it for wartime school gardens; is that right?

A. For the cafeteria.

Q. For their own food production?

A. Their own food production.

Q. Were those written leases or——

A. No, just oral.

Q. Just oral, rents on a month-to-month basis?

A. Year-to-year basis.

Q. Now, it is stipulated that, in 1946, you were approached by Samuel Wilder King, a real estate operator, who asked you if you would sell your land, and after several discussions, you entered into a written agreement with Samuel Wilder King, relative to the sale of your land.

A. Yes, sir.

Q. Why did you agree to sell most of your homestead?

(Testimony of Stephen G. Achong.)

A. Well, my friends and relatives came to me and asked me to sell the land.

Q. Speak up a little, please. You will have to speak a little louder, Mr. Achong. The rain is interfering with the sound of your voice.

A. I considered their suggestion and my neighbor, with his homestead, had sold his lots.

Q. You had a neighbor with a homestead like yours?

A. Yes, sir; he had cut his into lots and sold the property.

Q. That was a fellow named Duncan?

A. Duncan, yes.

Q. He had the homestead immediately next to yours? A. Yes, sir.

Q. And he had already cut his up and sold it?

A. Yes.

Q. In house lots? A. In house lots.

Q. And you say your relatives had spoken to you about— A. Relatives and friends.

Q. Asking you to sell your homestead?

A. My homestead.

Q. Was there much farming in the area where your homestead is located in 1946?

A. No, no farming at all.

Q. Had there been farming there in 1914, when you moved out there?

A. Yes; farming all along that section.

Q. Between 1914 and 1946, the character of the land changed, the use of the land changed?

A. The use of the land changed, yes, sir.

(Testimony of Stephen G. Achong.)

Q. As of 1946, it was mostly residential?

A. Turned into residential area, yes.

Q. You did enter into an agreement with Samuel Wilder King, which is Exhibit 3 to the Stipulation, and in accordance with that understanding, he did cut up your land into thirty-three lots?

A. That is right.

Q. Three of those lots were reserved by you; is that right?

A. Yes.

Q. One was your home?

A. One is my home.

Q. You are still living there?

A. Still living there.

Q. And two others fronting on the road for business use, possibly, in the future?

A. That is right.

Q. You still own those three lots?

A. That is right.

Q. The other thirty were sold?

A. Were sold.

Q. Who determined the price at which those other thirty lots were sold?

A. Mr. King.

Q. Subject to your approval?

A. That's right.

Q. Mr. King was an old friend of yours?

A. Yes, he is a friend of mine.

Q. Mr. Achong, it is stipulated that you were born on October 28, 1887; is that correct?

A. Yes, sir.

Q. That makes you a little over 67 years old?

A. 67.

(Testimony of Stephen G. Achong.)

Q. You never married? A. Single.

Q. What education did you have?

A. High school.

Q. You graduated from high school?

A. Yes, sir.

Q. High school of Honolulu?

A. Honolulu.

Q. It has also been stipulated that in 1914 until 1950 you were employed as cashier at the Metropolitan Meat Market No. 1 in Honolulu?

A. Yes, sir.

Q. You retired in 1950?

A. 1950, I retired.

Q. You are not now working any place?

A. Not working.

Q. Between 1914 and 1950, did you have any other employment, except for the argument as to whether you were in the real estate business here, than as cashier for the Metropolitan Meat Market?

A. No.

Q. That is the only job you held?

A. The only job I held.

Q. Do you own any other real property, other than your homestead? A. No, sir.

Q. Have you ever owned any other real property, other than that homestead that you live on, from 1914 to date? A. No, sir.

Q. Have you ever bought or sold any other real property? A. No, sir.

Q. Did you participate, yourself, personally, in making any sales of any of the thirty lots?

(Testimony of Stephen G. Achong.)

A. No, sir.

Q. Samuel Wilder King had an exclusive on that; is that right? A. Yes.

Q. And it is stipulated in the stipulation the fact that the lots that were sold were all sold on deposit receipt and contract forms, before any subdivision improvements were constructed, but on the representation that the improvements would be constructed; is that correct?

A. That is correct.

Q. In fact, the original purchasers of the thirty lots were all obtained within a matter of two or three months? A. Yes, sir.

Q. Before any bulldozers or anything else moved on the land to put in the roads?

A. That is right.

Mr. King: That is all.

Cross Examination

Q. (By Mr. Tonjes): Mr. Achong, you testified that you took no active part in the sale of these lots. A. No, sir.

Q. You didn't take any active part in that?

A. No; I left all that up to Mr. King.

Q. You also testified that some of your friends and relatives asked you to sell the property?

A. Yes, sir.

Q. They had in mind—did they have in mind that you would sell to them more lots suitable for erecting small dwelling houses?

(Testimony of Stephen G. Achong.)

A. That was the idea.

Q. And did some of those people contact you and discuss the matter with you? A. No.

Q. I thought you said that some of them did speak to you and asked you to sell them a lot; is that right?

A. No, they asked me to sell the whole thing, to sell the homestead.

Q. Sell the homestead?

A. Sell the homestead.

Q. You mean some people contacted you and wanted to buy the entire lot?

A. No, they wanted me to sell it and real estate people do the sub-division.

Q. Now, when someone contacted you, either a friend or relative, they didn't have in mind buying the entire tract, did they? A. No.

Q. And in order to work out the details, you referred them to Mr. King; is that right?

A. That's right.

Q. But some people did contact you directly, you referred them to King?

A. That is right.

Mr. Tonjes: That is all the questions, your Honor.

The Court: You have no further questions?

Mr. King: That is all your Honor.

The Court: Very well, you may stand aside.

(The witness was excused.)

The Court: Does the petitioner rest?

Mr. King: The petitioner rests.

Mr. Tonjes: The Respondent rests, your Honor.

The Court: Very well, gentlemen. What is your pleasure with regard to the time for filing briefs?

Mr. Tonjes: Whatever suits the Court's convenience, your Honor. Mr. King gets sixty days?

The Court: Simultaneous briefs or alternative briefs?

Mr. King: Alternative briefs, your Honor.

The Court: Very well, you want forty-five or sixty days?

Mr. King: I would like to have sixty days, if I may.

The Court: The petitioner may have until September 22nd for the original brief.

The original brief will be filed on or before September 22nd.

How much time, Mr. Tonjes, for your answering brief?

Mr. Tonjes: I think the usual time is forty-five days, isn't it, your Honor?

The Court: That is for the original brief, and if you desire that length of time——

Mr. Tonjes: I would like forty-five days.

The Clerk: November 8, if your Honor please.

The Court: The Respondent's answering brief will be filed on or before November 8, and thirty days from that date will be December 8.

The Clerk: The petitioner will file his original brief on September 22, the Respondent's reply brief

on November 8, the petitioner's final brief on December 8, 1954.

(Thereupon, at 9:30 o'clock a.m., the hearing in the above-entitled petition was closed.)

[Endorsed]: T.C.U.S. Filed August 30, 1954.

[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT AND OPINION

Filed March 26, 1956

Samuel P. King, Esq., and Herbert C. Dunn, C.P.A. for the petitioner. E. A. Tonjes, Esq., for the respondent.

This proceeding involves deficiencies in income tax for the years 1946 and 1947 in the respective amounts of \$10,799.76 and \$1,105.69.

The sole question presented is whether the income realized by petitioner from the sale of real property in the taxable years involved is taxable as ordinary income or capital gain.

Nearly all the facts are stipulated and are found accordingly.

Findings of Fact

Petitioner is a citizen of the United States and a resident of the City of Honolulu, Territory of Hawaii. His returns for the years involved were filed with the collector of internal revenue for the district of Hawaii at Honolulu, Hawaii.

Pursuant to a Special Homestead Agreement dated December 31, 1914, the petitioner was issued a land patent covering 11.55 net acres of Government land at Halekou, Territory of Hawaii.

In 1915 petitioner erected a dwelling on said land and has since occupied the dwelling as his home. From time to time until 1946 petitioner leased under short-term agreements portions of the land to various tenants for farming purposes.

Petitioner was employed as a cashier by Metropolitan Meat Market from 1914 until his retirement in 1950. Petitioner has never owned any other real estate.

In 1946 Samuel W. King, a real estate broker, discussed with petitioner the sale of his homestead property, and on June 27, 1946, a written agreement was entered into between them.

The agreement describes King as "a licensed real estate broker experienced in matters relating to sales of real estate." It provides that the petitioner grant to King the exclusive right, power, and authority to prepare for sale and to sell petitioner's 11.55 acres.

Under the terms of the agreement King was to hire and supervise surveyors and contractors as needed for preliminary planning and for putting the property in condition for sale in accordance with any approved plan of subdivision, the final plan of subdivision to be subject to petitioner's approval. Any plan of improvement was subject to petitioner's approval as to cost.

King was to be reimbursed by petitioner for all

expenses of preparing the property for sale, including without limitation the cost of surveying, mapping, and improving said property, and perfecting title. King was to pay all costs of promotion, advertising, and all other costs necessary for the sale.

King was to keep complete records and books of account which were to be open to petitioner's inspection.

The agreed sales price was to be not less than an average of 25 cents per square foot, the final prices and terms of sale to be agreed upon.

King was to receive 10 per cent commission of the gross sale and $2\frac{1}{2}$ per cent of monthly payments on account of sales on terms other than for cash. Pursuant to said agreement King prepared a plan of proposed subdivision which was approved by petitioner. On August 1, 1946, the City Planning Commission of the City of Honolulu gave preliminary approval and on January 15, 1948, gave final approval to the plan of subdivision.

On October 22, 1946, King, with the approval of petitioner, entered into a contract with the Paul Low Engineering & Construction Company for the construction of the necessary improvements. Costs of the survey, subdivision, construction and file plans, and final staking out were charged and paid for separately.

Between November 25, 1946, and February 17, 1947, the Paul Low Engineering & Construction Company billed to King and was paid the aggregate amount of \$32,000. The charges for surveying, etc.,

paid by King totaled \$3,000. All the payments were charged to the account of petitioner on the books of King.

Petitioner reserved Lots 16, 32, and 33. Lot 16 included the dwelling occupied by petitioner. Lots 32 and 33 were reserved for future business use.

King prepared forms to be used in connection with the sale of lots. These forms included a deposit receipt and contract, deed and mortgage. During the period July 18, 1946, to November 19, 1946, deposit receipt and contract forms were executed by purchasers for the 30 lots offered for sale. King received all payments, processed all papers, and made all disbursements. He made appropriate entries in petitioner's account and rendered periodic statements to petitioner.

All sales were made by King without advertising of any kind. No "For Sale" signs were erected on the property. King maintained a real estate office which indicated he had property of the type here in question for sale. All the lots were sold through the activities of King either by contacting persons whom he believed to be prospective purchasers or by suggesting to persons contacting him that the lots were for sale. On occasion prospective purchasers contacted petitioner, who referred them to King. Petitioner took no part in negotiating any sales.

In his returns for the years 1946 and 1947 petitioner elected to return the gains from the sale of lots on the installment basis. The gain realized in 1946 was \$35,199.48, and in 1947 was \$6,504.39, 50

per cent of which was taken into account as long-term capital gain. The respondent determined that the total gain realized in the respective taxable years was ordinary income.

The lots in question were lands held by petitioner primarily for sale to customers in the ordinary course of his trade or business, and the gain realized from the sales in the taxable years involved is taxable as ordinary income.

Opinion

LeMire, Judge: The question presented is whether the gain realized each year from the sales of lots is taxable as ordinary income or as capital gain. The respondent determined that the lots constituted property held by the petitioner primarily for sale to customers in the ordinary course of his trade or business. Section 117(a)(1), Internal Revenue Code of 1939. Neither the facts nor the amounts involved are in dispute. The cases in which a similar issue has been litigated are legion. The courts have applied various tests, none of which are regarded as determinative. The issue is one of fact and the question must be viewed in the light of the particular facts of the case under review. *Louisiana Western Lumber Co.*, 22 T.C. 954; *Dunlap vs. Oldham Lumber Co.*, 178 F.2d 781; *Mauldin vs. Commissioner*, 195 F.2d 714.

Petitioner acquired the property, consisting of 11.55 acres, in 1914 under a patent granted by the Territory of Hawaii. A dwelling was erected thereon which petitioner has since occupied as his resi-

dence. Petitioner devoted a portion of the land to raising vegetables, and from time to time rented other portions to tenants for similar purposes. Petitioner never owned other real estate. He was employed full time as a cashier in a market.

Prior to the taxable years the character of the neighborhood changed from a rural to a residential community. Surrounding homestead lands were subdivided and sold for residential lots. The property had appreciated in value and petitioner was urged by relatives and friends to sell. Petitioner chose not to sell the property in the condition in which it was acquired and thus have the benefit of the preferred treatment of capital gains, but to subdivide it and make improvements to reap the benefits of increased selling prices. To accomplish his purpose he entered into a contract with Samuel W. King, a licensed real estate broker experienced in the sale of real property. The substance of such contract is set forth in our findings of fact and need not be here repeated.

The contract with King did not effect a sale of the property. Nor was King an independent contractor since his major activities were subject to the approval of petitioner. The fact that petitioner was otherwise employed and did not give his personal attention to the business is not decisive. One may conduct a business through agents or representatives. The business is none the less his because he permits others to bear the burden of management. *Welch vs. Solomon*, 99 F.2d 41; *Richards vs. Commissioner*, 81 F.2d 369. As King was acting

In the United States Court of Appeals
for the Ninth Circuit

[Title of Cause No. 33319.]

PETITION FOR REVIEW AND ASSIGNMENT
OF ERRORS

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

1. Petitioner, Stephen G. Achong, of the City of Honolulu, City and County of Honolulu, Territory of Hawaii, represents that on March 27, 1956, the Tax Court of the United States rendered a decision (T. C. Memo. 1956-73, Docket No. 33319) that there are deficiencies in income taxes of your petitioner in the amount of \$10,799.76 for the year 1946 and of \$1,105.69 for the year 1947, and petitioner asks a review of said decision by this Court.

2. Petitioner is a citizen of the United States and a resident of the city of Honolulu, City and County of Honolulu, Territory of Hawaii, and his returns for federal income tax purposes for the taxable years 1946 and 1947 were made to the collector of internal revenue for the District of Hawaii whose office is located in Honolulu, Territory of Hawaii, which is within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit.

3. The nature of the controversy involves the question of whether the gain realized from the sale of Petitioner's homestead land was ordinary income or a capital gain.

4. Petitioner assigns as errors committed by the Tax Court of the United States in its decision aforesaid the following:

(1) The court erred in holding that the land in question was held by Petitioner primarily for sale to customers in the ordinary course of his trade or business, and in failing to hold instead that the land was a capital asset.

(2) The court erred in holding that the gains realized by the Petitioner from the sale of his homestead during the taxable years 1946 and 1947 were ordinary income, and in failing to hold instead that the gains were long-term capital gains.

(3) The court erred in holding that there are deficiencies of \$10,799.76 and \$1,105.69, respectively, in the Petitioner's returns of income taxes for the calendar years 1946 and 1947, and in failing to determine instead, that there is a deficiency of \$184.04 in the Petitioner's return of income tax for the calendar year 1946 and that Petitioner's original return of income tax for the calendar year 1947 was correct.

Wherefore, your Petitioner prays that this Court review the aforementioned decision of the Tax Court of the United States pursuant to the statute in such case made and provided and the rules of this court.

Dated at Honolulu, Hawaii, this 22nd day of June, 1956.

/s/ SAMUEL P. KING,

Attorney for Petitioner

Duly Verified.

[Endorsed]: T.C.U.S. Filed June 26, 1956.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Cause No. 33319.]

NOTICE OF FILING PETITION FOR
REVIEW

To: Commissioner of Internal Revenue, Washington, D. C.:

You are hereby notified that Stephen G. Achong, on June 26, 1956, filed with the clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit, of the decision of said Tax Court rendered on March 27, 1956, in the case entitled Stephen G. Achong, Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 33319. Attached hereto is a copy of said petition for review and assignment of errors.

Dated at Honolulu, Hawaii, this 26th day of June, 1956.

/s/ SAMUEL P. KING,
Attorney for Petitioner

Acknowledgment of Service attached.

[Endorsed]: T.C.U.S. Filed June 26, 1956.

The Tax Court of the United States
Washington

[Title of Cause No. 33319.]

CERTIFICATE

I, Ralph A. Starnes, Chief Deputy Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 10, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record on Appeal and Praecipe for Record", including Joint exhibits 1 through 8 attached to the Stipulation of Facts, in the proceeding before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 13th day of July, 1956.

[Seal] /s/ RALPH A. STARNES,
Chief Deputy Clerk, Tax Court
of the United States

[Endorsed]: No. 15229. United States Court of Appeals for the Ninth Circuit. Stephen G. Achong, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: August 6, 1956.

Docketed: August 15, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15229

STEPHEN G. ACHONG,

Petitioner-Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

STATEMENT OF POINTS INTENDED TO BE
RELIED UPON ON APPEAL

Comes now Stephen G. Achong, Petitioner-Appellant, by Samuel P. King, his attorney, and submits the following as his statement of the points on which he intends to rely on this appeal:

1. The court erred in holding that the land in question was held by Petitioner-Appellant pri-

marily for sale to customers in the ordinary course of his trade or business, and in failing to hold instead that the land was a capital asset.

2. The court erred in holding that the gains realized by the Petitioner-Appellant from the sale of his homestead during the taxable years 1946 and 1947 were ordinary income, and in failing to hold instead that the gains were long-term capital gains.

3. The court erred in holding that there are deficiencies of \$10,799.76 and \$1,105.69, respectively, in the Petitioner-Appellant's returns of income taxes for the calendar years 1946 and 1947, and in failing to determine instead that there is a deficiency of \$184.04 in the Petitioner-Appellant's return of income tax for the calendar year 1946 and that Petitioner-Appellant's original return of income tax for the calendar year 1947 was correct.

Dated at Honolulu, Hawaii, this 23rd day of October, 1956.

/s/ SAMUEL P. KING,

Attorney for Petitioner-Appellant

Certificate of Service attached.

[Endorsed]: Filed October 27, 1956. Paul P. O'Brien, Clerk.

No. 15,229

United States Court of Appeals
For the Ninth Circuit

STEPHEN G. ACHONG,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appeal from The Tax Court of the United States.

BRIEF FOR PETITIONER.

SAMUEL P. KING,

210 Hawaiian Trust Building,

Honolulu 13, Hawaii,

Attorney for Petitioner.

FILE

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PAUL P. O'BRIEN, C

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No. 15,229

United States Court of Appeals For the Ninth Circuit

STEPHEN G. ACHONG,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appeal from The Tax Court of the United States.

BRIEF FOR PETITIONER.

JURISDICTION.

On April 2, 1951, Petitioner, Stephen G. Achong, filed a Petition in The Tax Court of the United States against the Commissioner of Internal Revenue, Respondent, for a redetermination of income tax deficiencies asserted by the Respondent against the Petitioner for income taxes for the calendar years 1946 and 1947 in the amounts of \$10,799.76 and \$1,105.69, respectively, a total amount of \$11,905.45, of which \$11,721.41 is in dispute. (R. 3-15.)

Petitioner is an individual, a citizen of the United States, and a resident of City and County of Honolulu, Territory of Hawaii. His income tax returns for the years here involved were filed with the (then) Collector of Internal Revenue, District of Hawaii, at Honolulu, Hawaii. (R. 18.)

Jurisdiction over the case was conferred upon The Tax Court of the United States pursuant to I.R.C. (1939) Sec. 1101.

The case was heard on July 22, 1954, in a Division of The Tax Court of the United States sitting in Honolulu, Hawaii, the Honorable C. P. LeMire Presiding. (R. 2.) The Tax Court of the United States entered its Memorandum findings of fact and Opinion on March 26, 1956 and its Decision (T. C. Memo. 1956-73, Docket No. 33,319) on March 27, 1956. The Decision, in favor of the Respondent, is that there are deficiencies in income taxes of Petitioner in the amount of \$10,799.76 for the year 1946 and of \$1,105.69 for the year 1947. (R. 2, 42-48.)

On June 26, 1956, within three months from the entry of the Decision, Petitioner perfected his appeal to this Court by the filing of his Petition for Review, Bond, Notice of filing Petition for Review, Designation of Contents of Record on Appeal, and Praecipe for Record. (R. 2-3, 49-54.)

Jurisdiction over this case on appeal is conferred upon this Court pursuant to Title 26, U.S.C., Secs. 7482 and 7483.

STATEMENT OF FACTS.

The facts in this case were for the most part agreed to. In addition thereto the Petitioner testified briefly. The facts are restated and summarized as follows:

1. The Petitioner is an individual, 67 years old (born October 28, 1887), unmarried, a citizen of the

United States, and a resident of the City and County of Honolulu, Territory of Hawaii. His home address is 45-503 Kamehameha Highway, Kaneohe, Oahu, Territory of Hawaii. The income tax returns for the years here involved were filed with the (then) Collector of Internal Revenue, District of Hawaii, at Honolulu, Hawaii. (R. 18.)

2. The notice of deficiency, a copy of which is attached to the petition as Exhibit A, was mailed to the Petitioner on March 14, 1951. (R. 18.)

3. The deficiencies as determined by the Commissioner of Internal Revenue are in income taxes for the calendar years 1946 and 1947 in the amounts of \$10,799.76 and \$1,105.69, respectively, a total of \$11,905.45, of which \$11,721.41 is in dispute. For the calendar year 1946 the taxpayer reported and paid a tax of \$8,284.93 and the Commissioner of Internal Revenue claims a tax of \$19,084.69. For the calendar year 1947 the taxpayer reported and paid a tax of \$1,926.93 and the Commissioner of Internal Revenue claims a tax of \$3,032.62. Petitioner admits an additional tax for the calendar year 1946 of \$184.04. (R. 18-19.)

4. On August 17, 1923, Petitioner was issued a deed, Land Patent No. 8277 (Exhibit 2), to 11.63 (11.55 net) acres of government land at Halekou-Waikaluakai Homesteads, Koolaupoko, Oahu, Territory of Hawaii, pursuant to Special Homestead Agreement No. 1170 (Exhibit 1), in accordance with the provisions of Section 73 of the Hawaiian Organic Act and Sections 352, et seq., of the Revised Laws of Hawaii 1915. (R. 19.)

5. In 1915 Petitioner erected a dwelling on the said homestead land and has occupied the said dwelling as his home continuously from 1915 to the present time. (R. 19, 32-34, 37.)

6. From time to time during the period from the date of Special Homestead Agreement No. 1170 (Exhibit 1) until 1946 Petitioner leased portions of the said homestead land to various tenants under short term tenancy agreements for farming purposes. (R. 19, 32-35.)

7. Petitioner was employed full time as a cashier by Metropolitan Meat Market No. 1, Honolulu, from 1914 until his retirement in 1950. During this period and up to the present time, he has never held any other job or had any other employment. He has never had any office or place of business of his own. He has never owned or held title to any real property other than the above described homestead land. (R. 19-20, 38.) He has never bought or sold any other real property. (R. 38.)

8. In 1946, Samuel W. King, a real estate broker and dealer in land, asked Petitioner if Petitioner would sell all or any portion of the said homestead land. After several discussions Petitioner and Samuel W. King entered into a written agreement dated June 27, 1946, relative to the sale of this land. (Exhibit 3.) Immediately thereafter Samuel W. King opened an account in his books in the name of Petitioner. (R. 20, 35-36.) Samuel W. King is an old friend of Petitioner. (R. 37.)

9. Pursuant to the said agreement (Exhibit 3), Samuel W. King prepared a proposed subdivision of the homestead land in accordance with the Revised Ordinances of the City and County of Honolulu 1942 and the Revised Laws of Hawaii 1935. This proposed subdivision (Exhibit 4), was approved by Petitioner and on August 1, 1946, was given Preliminary Approval, and on January 15, 1948, Final Approval, by the City Planning Commission of the City and County of Honolulu as required by law. (R. 20.)

10. The applicable ordinances of the City and County of Honolulu and the applicable laws of the Territory of Hawaii provided that a subdivider of rural land need install only necessary streets and water mains, including fire hydrants. Sewers, sidewalks, and electric and gas utilities were not required by law. (R. 20-21.)

11. In connection with the preparation of the aforesaid plan of subdivision and the construction of the required improvements, and acting under the agreement of June 27, 1946, and with the approval of Petitioner, Samuel W. King retained the Paul Low Engineering and Construction Company. On August 24, 1946, this engineering firm submitted an estimate of construction items. (Exhibit 5.) On October 22, 1946, Samuel W. King and the Paul Low Engineering and Construction Company entered into a written agreement approved by Petitioner for the construction of the necessary improvements. (Exhibit 6.) Costs of the survey, subdivision, construction and file plans,

and final staking out were charged and paid for separately. (Exhibit 7.) The required improvements contracted for were completed and accepted in February, 1947, and the roadway was conveyed to the Territory of Hawaii on December 5, 1949. (R. 21.)

12. Payments to the Paul Low Engineering and Construction Company were billed to and made by Samuel W. King in accordance with the terms of the contract between them (Exhibit 6) as follows:

Payment (a) of \$6,400.00 on November 25, 1946;

Payment (d) of \$1,600.00 on December 11, 1946;

Payment (b) of \$6,400.00 on January 14, 1947;

Payment (c) of \$6,400.00 on January 31, 1947;

Half of payment (e) or \$4,000.00 on December 22, 1947;

The balance of payment (e) or \$4,000.00 on January 14, 1948;

Final payment (f) of \$3,200.00 on January 29, 1948.

The charge for surveying, et cetera (Exhibit 7) was billed to and paid by Samuel W. King as follows:

\$2,700.00 on November 14, 1946; and

\$300.00 on February 17, 1947.

All payments were charged to the account of Petitioner in the books of Samuel W. King. (R. 21-22.)

13. In the approved subdivision (Exhibit 4), Lots 16, 32 and 33 were reserved by Petitioner and are still unsold. Lot 16 was and is set aside as Petitioner's own residential lot and includes the dwelling occupied by Petitioner. Lots 32 and 33 were and are reserved

for possible future business use. All of the remaining lots were sold as set forth below. (R. 22.)

14. Following the execution of the agreement of June 27, 1946 (Exhibit 3), Samuel W. King had certain forms prepared to be used in connection with the sale of lots in the proposed subdivision, called the Puahuula Subdivision. These forms included a Deposit Receipt and Contract (Exhibit 8), Deed and Mortgage. During the period July 18, 1946 to November 19, 1946, Deposit Receipt and Contract forms were executed by purchasers for all 30 lots offered for sale. Some of these original contracts were modified or cancelled as detailed below. (R. 22-23.)

15. The detailed history of the sale of each lot is as follows:

Lot No.	Purchaser	Date of Deposit Receipt and Contract	Date of Deed
1.	MERCADO	7-26-46	11-25-46
2.	CARVALHO	8-10-46	11-19-46
3.	QUON	8-16-46	11-25-46
4.	BRANDT	8-17-46	11-25-46
5. }	CYPHER, G	8-23-46	11-19-46
6. }			
7.	FORDE	9-10-46	11-19-46
8.	KEANE	8-17-46	11-19-46
9.	CAZINHA	8-19-46	11-25-46
10. }	LUKE	8-13-46	11-19-46
11. }			
12.	YASUDA	8-11-46	11-19-46
13.	RIDENOUR	8-17-46	12- 5-46
14.	KEENE	8-10-46	11-19-46

Lot No.	Purchaser	Date of Deposit Receipt and Contract	Date of Deed
15.	LI	8-10-46	11-19-46
16.	Reserved as Petitioner's Residence.		
17.	WON, P.	8-10-46	11-19-46
18. }	ACHONG, H.	8-17-46	Cancelled
19. }			11-18-46
18.	ACHONG, H.	11-18-46	11-25-46
19.	HALUALANI	11-19-46	11-25-46
20.	YAMANE	8-17-46	Cancelled 11-12-46
20.	HALUALANI	11-14-46	11-25-46
21.	NAVARRO	8-27-46	12-10-46
22.	CYPHER, C.	8-27-46	11-25-46
23.	TOBALADO	9- 4-46	11-19-46
24.	MUNN	9-10-46	11-19-46
25. }	ROSS	8-14-46	Cancelled
26. }			12-28-46
25.	KING, P.	5- 1-47	5-27-47
26.	TANIOKA	6- 4-48	4-14-48
27. }	MURABAYSHI	7-18-46	11-19-46
28. }			
29.	WON, J.	8-26-46	11-19-46
30. }	McPHERSON	7-26-46	11-19-46
31. }			
32. }	Reserved for Possible Future Business Use.		
33. }			

(R. 23-24.)

16. The details of the terms of sale of and payments for each lot are as follows:

Lot No.	Price	Total Deposit	Balance
1.	\$4,200	\$1,050	Mtge 11-25-46
2.	3,465	350	Cash 11- 8-46
3.	3,519	1,850	Cash 11-25-46
4.	3,548	1,000	Mtge 11-25-46
5. }	7,178	1,800	Mtge 11-19-46
6. }			
7.	3,133	783.50	Mtge 11-19-46
8.	3,653	913	Mtge 11-19-46
9.	3,688	370	Cash 1-14-47
10. }	7,458	740	Cash 11- 7-46
11. }			
12.	3,770	380	Cash 11-19-46
13.	3,800	380	Cash 12-16-46
14.	3,825	3,285	Note 11-19-46
15.	3,855	1,850	Cash 11- 7-46
16.	Reserved		
17.	3,240	810	Mtge 11-19-46
18.	3,466	866.50	Mtge 11-25-46
19.	4,700	1,175	Mtge 12-11-46
20.	4,740	1,180	Mtge 11-25-46
21.	3,588	897	Mtge 12-10-46
22.	3,620	365	Mtge 11-25-46
23.	3,557	890	Mtge 11-19-46
24.	3,222	795.50	Cash 12-29-46
25.	4,996	Cash 5- 2-47
26.	4,996	1,660	Mtge 6-16-48
27. }	7,590	750	Cash 11- 4-46
28. }			
29.	3,840	960	Mtge 11-19-46
30. }	7,780	700	Cash 11-13-46
31. }			
32. }	Reserved		
33. }			

(R. 24-25.)

17. The details of the purchase money mortgages outstanding during the calendar years 1946 and 1947 are as follows:

Lot No.	Amount of Mortgage	Monthly Payment (Inc. Int.)	Paid in 1947	
			Prin.	Int.
1.	\$3,150	\$50.00	\$ 148.52	\$151.66
4.	2,548	50.00	442.36	107.64
5. }	5,378	60.00	1,278.41	215.61
6. }				
7.	2,349.50	50.00	449.70	110.62
8.	2,740	40.00	321.04	118.96
14.	540 (note)	50.00	540.00	13.09
17.	2,430	50.00	447.87	102.13
18.	2,599.50	50.00	439.96	110.04
19.	3,525	50.00	375.00	115.96
20.	3,560	50.00	375.00	153.60
21.	2,691	50.00	428.69	126.31
22.	3,255	50.00	622.94	67.06
23.	2,667	50.00	764.55	95.35
26.	3,336	50.00
29.	2,880	50.00	374.79	125.21

There were no mortgage payments during the calendar year 1946. (R. 25.)

18. Total costs incurred under the agreement of June 27, 1946 (Exhibit 3) as of December 31, 1946, were as follows:

Construction of improvements	\$32,000.00
Survey, plans, staking	3,000.00
Legal expense	200.00
Certificate of title	30.00
Blue prints of tract	7.85

Stamp taxes	123.00
Deeds	230.00
Acknowledgments	25.00
Sales commissions	10,443.50

Additional costs thereafter included only sales commissions, cost of papers, revenue stamps, certificates of title, notary fees, legal and accounting fees. (R. 25-26.)

19. All sales were made by Samuel W. King without any advertising of any kind. No signs were erected on the property. Samuel W. King maintained a real estate office which indicated that he had property of the type herein involved for sale. The lots were sold through the activities of Samuel W. King by either contacting persons whom he believed to be prospective purchasers or by Samuel W. King suggesting to prospective purchasers who contacted him that the lots in question were for sale. Petitioner took no part in negotiating any of the said sales. Purchasers were for the most part relatives or friends living in the Kaneohe area (where the homestead is located). The purchasers of Lots 2, 15, 17, 18 and 29 are related to Petitioner by blood or marriage. The purchasers of Lots 8, 14, and 25 are related to Samuel W. King by marriage. All lots were sold on Deposit Receipt and Contract forms before any subdivision improvements were constructed, but on the representation that improvements would be constructed. Samuel W. King received all payments, processed all papers, and made all disbursements, crediting and debiting Petitioner's

account in the books of Samuel W. King as appropriate, and rendering periodic statements to Petitioner. While none of the proceeds have been actually turned over to Petitioner, all proceeds were credited to the account of Petitioner and Samuel W. King has invested the net amount thereof for Petitioner. (R. 26-27, 36-38.)

20. Petitioner elected, in his individual income tax returns for the calendar years 1946 and 1947, to return on the installment basis the gains realized from sales of his homestead land. In his income tax return for the calendar year 1946, he reported a gain from the sale of his homestead land of \$34,542.80. The Commissioner has determined that the correct amount of gain was \$35,199.48. Petitioner admits that the correct amount of gain for the calendar year 1946 was \$35,199.48. (R. 17.)

QUESTION INVOLVED.

Was the income realized by the Petitioner in the taxable years 1946 and 1947 from the sale of his homestead land ordinary income or capital gain?

SPECIFICATION OF ERRORS.

1. The Court erred in holding that the land in question was held by Petitioner primarily for sale to customers in the ordinary course of his trade or business, and in failing to hold instead that the land was a capital asset.

2. The Court erred in holding that the gains realized by the Petitioner from the sale of his homestead during the taxable years 1946 and 1947 were ordinary income, and in failing to hold instead that the gains were long-term capital gains.

3. The Court erred in holding that there are deficiencies of \$10,799.76 and \$1,105.69, respectively, in the Petitioner's returns for income taxes for the calendar years 1946 and 1947, and in failing to determine instead, that there is a deficiency of \$184.04 in the Petitioner's return for income tax for the calendar year 1946 and that Petitioner's original return of income tax for the calendar year 1947 was correct.

SUMMARY OF ARGUMENT.

I. The gains realized on the sale of Petitioner's homestead land were capital gains and not ordinary income because:

A. The homestead land was acquired and continuously held by Petitioner for more than six months as a home for himself and as agricultural land for the growing of crops, and not primarily for sale to customers in the ordinary course of trade or business.

B. Petitioner was not engaged in the business of selling real property during either of the taxable years 1946 and 1947, or at any other time.

ARGUMENT.**I.**

THE GAINS REALIZED ON THE SALE OF PETITIONER'S HOMESTEAD LAND WERE CAPITAL GAINS AND NOT ORDINARY INCOME BECAUSE:

- A.** The homestead land was acquired and continuously held by Petitioner for more than six months as a home for himself and as agricultural land for the growing of crops, and not primarily for sale to customers in the ordinary course of trade or business.

The Petitioner contends that the lots sold by him during the years 1946 and 1947 were capital assets within the meaning of Section 117 (a) (1) of the Internal Revenue Code of 1939 and any gains realized by him upon the sale of the lots were long-term capital gains within the meaning of Section 117 (a) (4) of the Code. Those provisions of the Code read as follows:

“Sec. 117. CAPITAL GAINS AND LOSSES.

(a) Definitions—As used in this chapter—

(1) Capital Assets—The term ‘capital assets’ means property held by the taxpayer (whether or not connected with his trade or business), but does not include— * * *

(4) Long term capital gain—The term ‘Long-term capital gain’ means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing net income;”

Petitioner first acquired an interest in the homestead land in question in 1914 as the purchaser under

a Special Homestead Agreement issued by the government of the Territory of Hawaii. *Fact 4.*

This agreement (Ex. 1) provides among other things:

“The Purchaser enters into this agreement with the intention of maintaining his home and residing on said land permanently and, except as otherwise hereinafter provided, shall maintain his home and reside upon said land at least five (5) years during the first ten (10) years after said date, such maintenance of a home and residence to begin within two years after said date, and no period of less than six (6) months of continuous residence at said home shall be held to be a part of said five years.

“Neither said land nor any part thereof or interest therein or control thereof shall, without the written consent of the Commissioner and Governor, be or be contracted to be in any way, directly or indirectly, by process of law or otherwise, conveyed, mortgaged, leased, or otherwise transferred to or acquired or held by or for the benefit of any other person, before a patent has been issued thereon; * * *

“Ten (10) years after said date or at any time within two years thereafter, if all the covenants and conditions have been observed and performed, of which observance and performance the Purchaser shall make affirmative proof, the Purchaser if he is now or shall then and within five years after said date have become a citizen of the United States, shall be entitled to a patent conveying said land in fee simple: Provided, that the Purchaser shall be entitled to such patent at

any time after three years within said ten years, if he has observed and performed all covenants and conditions so far as required up to that time, and has paid the entire purchase price, and has maintained his home and resided on said land for at least three (3) years continuously, and has cultivated and maintained under cultivation as aforesaid at least 50 per cent of said land, and had and maintained at least twenty-five (25) growing trees per acre upon the remainder of said land, for at least three (3) years continuously.”

Petitioner moved onto the land in 1915 and has lived there ever since. *Fact 5.* Except for the area occupied by Petitioner as a home, the land was farmed from about 1918 to 1930, remained idle from about 1930 to 1940, and then farmed again from 1940 to 1946. (R. 31-36.)

He received his patent (Ex. 2) in 1923, having complied with the provisions of the Special Homestead Agreement. (Ex. 1.) While the patent (Ex. 2) does convey the 11.63 acres of homestead land in fee simple, it nevertheless is subject to the restrictions set forth in Section 73 of the Hawaiian Organic Act (a federal statute), prohibiting aliens, corporations, or persons owning other lands which together with any part of this land would add up to 80 acres, from having any interest in the homestead land without the consent of the Governor and the Commissioner of Public Lands.

It is absolutely certain from this recital that the homestead land in question was not acquired primarily for sale to customers in the ordinary course of trade or business.

Furthermore, there can be no doubt whatsoever that this homestead land was continuously held by Petitioner for a period of over 31 years, from 1914 to 1946, as a home and farm for himself, and not primarily for sale to customers in the ordinary course of trade or business. Respondent does not contend that there was any activity by Petitioner or any one on his behalf prior to 1946 looking toward the sale of the whole or any part of Petitioner's homestead.

Clearly, therefore, if Petitioner in 1946 had sold his entire homestead to one buyer without causing it to be subdivided, any gain realized from such a sale would have been unquestionably a capital gain and not ordinary income.

But Petitioner is not required to limit himself to such a single sale in order to stay within the provisions of the Internal Revenue Code relating to capital gains.

In *Boomhower v. United States*, 74 F. Supp. 997 (DC ND Iowa, 1947), the taxpayer was a lawyer who acquired a 20-acre tract of unimproved pasture land. The land was platted, improved, advertised, and sold over a period of time. The Court held that the gains realized were capital gains, saying in part:

“The purpose of the statutory allowance of a lower rate of taxation on the gain derived from the conversion of capital assets is to alleviate the burden which would be incurred by the taxpayer, should that gain be classified as ordinary income over a short tax period when, in fact, it had accrued over a long period of investment, and to

remove the deterrent effect of that burden on such conversions * * *

“Several tests have been referred to by the courts in analyzing the nature of the transaction by a taxpayer for the purpose of determining which * * * sections of the Internal Revenue Law shall be applied. Continuity of sales or sale related activity over a period of time * * * Frequency of sales, as opposed to isolated transactions * * * The activity of the seller or those acting under his instruction or in his behalf, or the time and labor given to effect the transaction, such as by improvements or advertisement to attract purchasers * * * The extent or substantiality of the transaction * * * The reasons for, purpose or nature of the acquisition of the subject matter * * * Some courts have similarly attached weight to the reason for, purpose or nature of the sale of the subject matter. A taxpayer’s claim that his only desire was to convert or liquidate an asset rather than to conduct a business would then be of importance for judicial consideration. This ‘liquidation test’, however, has generally been rejected by a recognition that the activity of the taxpayer in disposing of the subject matter could reach the proportion of one doing business regardless of his impelling motives * * *”

In *Dillon v. Commissioner of Int. Rev.*, 213 F (2d) 218 (CA 8 1954), the taxpayer was a contractor who had built housing units under an arrangement with the FHA whereby the units would be rented to defense workers at a fixed rental and would not be disposed of except as authorized by the FHA. A corporation organized by the contractor held title to the

houses and the land on which they were constructed. When the 20 houses in issue were completed in 1944 and 1945 they were deeded to the contractor. In 1945 all restrictions on the rental and sale of the houses were lifted. In 1946 the 20 houses were sold through a company engaged in the real estate business. The Court held that the gain from the sales of these houses was a capital gain, saying in part:

“One may, of course, liquidate a capital asset. To do so it is necessary to sell. The sale may be conducted in the most advantageous manner to the seller and he will not lose the benefits of the capital gain provision of the statute, unless he enters the real estate business and carries on the sale in the manner in which such a business is ordinarily conducted. In that event, the liquidation constitutes a business and a sale in the ordinary course of such a business and the preferred tax status is lost.”

In *Fahs v. Crawford*, 161 F (2d) 315 (CCA 5 1947), the taxpayer was a lawyer who bought an interest in a tract of subdivided land as a speculative investment. After several years of trying to sell the land, the owners were approached by a man who was a contractor, real estate broker and developer with a scheme for selling the land with FHA financing which however required the construction of additional improvements, which was done. In holding that the gain from the sale of this land in lots was a capital gain the Court said in part:

“Clearly these lands were originally purchased by the taxpayer as an investment. Though already

platted into subdivision, the lands were purchased en bloc, and the owners attempted to sell them as a whole. Failing, they tried sale at retail through a broker. This effort met with but small success. From 1925 to 1938 they again held the lands for sale as a whole, without success. It was then they were approached by Commander with the method of sale above described. Nothing could be done until the property was approved for FHA loans, and a condition of that approval was water, lights and paving. These the taxpayer and Commander set out together to secure, in order to render the property saleable—the taxpayer in order to dispose of his investment—Commander in order to earn profits in his business as a building contractor, real estate broker and developer, in all of which activities there were prospective profits for him. In effect, what the taxpayer was doing was to render more attractive a capital asset already owned in order to sell it, in much the same way as an owner would paint and redecorate an old house, and landscape the grounds, in order that his broker could more readily dispose of it for him. These activities were but preliminaries. After FHA approval of the lands had been secured for loans, the taxpayer devoted no part of his time to any activity connected with the sale or development of the lots. This selling was carried on independently by Commander, without any supervision or control by the taxpayer.”

Applying the principles of these cases to the case at hand, what do we find?

Petitioner acquired his homestead land as a personal residence and farm. *Fact 4.* The increase in value re-

sulting in the gain which is at issue accumulated over a period of more than 31 years. Petitioner decided to sell that portion of his homestead which he was not occupying as a residence because the character of the area had changed from farming to residential, because his friends and relatives were urging him to let them buy his land, and because he was getting along in years and had no direct descendants to whom to leave his land. (R. 36-37.)

The shape of his homestead land was such that the rear portion could not be reached without a road. (Ex. 4.) It would not have been practicable to hold out a residential area for himself and sell the balance of the homestead without a road, and once a road was put down the middle of the land, the division of the area into lots required no extra expense other than staking.

Only the minimum improvements necessary to satisfy the requirements of the City and County of Honolulu were constructed. *Fact 9.* All sales were consummated before any improvements were actually constructed. *Fact 19.*

Petitioner himself did not take an active part in selling the land. *Fact 19.* He has never been in the real estate business. *Fact 7.* All sales were consummated without any advertising of any kind. *Fact 19.* Purchasers were largely friends, neighbors and relatives of Petitioner. *Fact 19.* All lots were originally sold in a period of only two months. *Fact 15.* Thereafter there were only 5 sales, 3 in November, 1946, one in

May, 1947, and one in June, 1948, because of cancellations of original sales. *Fact 15.*

The facts of this case, in short, bring it squarely within the reason and purpose of the capital gain provisions of the Internal Revenue Code, and also squarely within the principles of the decided cases.

In *Ellis v. Commissioner*, Docket Nos. 34505 and 34506, T. C. Memo decision, entered January 13, 1954 (CCH Dec. 20,106 (m)), taxpayers were husband and wife. Dr. Ellis was a physician and had a full time college teaching position. In 1935 he inherited 166 acres of land. This is the only land he ever owned. Prior to 1946 it was used as agricultural land. In 1946 he subdivided 44 acres into 72 lots suitable for home building. He hired an engineering firm to survey and put in improvements consisting of an improved road, culverts, and so forth. He hired a Mr. Taylor to supervise the details of the subdivision and to handle the sale of the lots. Taylor was not a real estate salesman but was building his own home on the subdivision and available most of the time to meet prospective purchasers. The sale of the lots was advertised by placing a sign on the property bearing the name of the development and Dr. Ellis' number. The lots were sold during 1946, 1947, 1948. Both Taylor and Ellis made sales. Over 70% of all sales were made within two months after the tract was opened in 1946. Mrs. Ellis kept the records.

The Court decided that the gains realized from these sales were capital gains.

In *Thrifty v. Commissioner*, 15 T. C. 366 (1950), the taxpayer had purchased 62 acres of unimproved land. In 1944 and 1945 he was approached to sell the land. He put a price on the land but no sale was consummated. He then opened negotiations with a group of home builders who were interested in building houses on the land but lacked the necessary capital to install streets, sewers, and water lines. In the latter part of 1945, pursuant to a general understanding with the home builders, he caused the land to be platted into 238 lots, and put in the improvements. He made no effort to sell the property to the general public. The property was never listed with a real estate agent nor advertised in any way. He sold only to the builders (5 in number) and to his son.

The Court held that the gains realized from the sale of these lots were capital gains.

B. Petitioner was not engaged in the business of selling real property during either of the taxable years 1946 or 1947, or at any other time.

It is clear that Petitioner has never consciously engaged in the real estate business. *Fact 7*. The only land he has ever sold in his entire lifetime is the land in question. As to this, he took no part in effecting any of the sales made. *Fact 19*.

The fact that Samuel W. King was an experienced real estate broker is not determinative because even he did not engage in any extensive activity in order to process the sales of Petitioner's homestead land. *Fact 19*. The land actually sold itself.

In *Pope v. Commissioner*, 77 F (2d) 599 (CCA 6, 1935), the Court held that the sale of land through real estate brokers did not of itself make the sale a sale by the taxpayers in the ordinary course of the taxpayers' trade or business.

In *Snell v. Commissioner*, 97 F (2d) 891 (CCA 5, 1938), it was said that business means "business" and implies that someone is kept more or less busy.

In *Boomhower v. United States*, *supra*, it was said that the occasional purchase and resale of land by an investor speculating on a rise in real estate values does not of itself make him a dealer in real estate for income tax purposes. See also *Fahs v. Crawford*, *supra*.

In *Dunlap v. Oldham Lumber Co.*, 178 F (2d) 781 (CA 5, 1950), the taxpayer acquired some vacant lots in a platted and approved subdivision in 1928. Several years later utilities were installed by the taxpayer. The lots were offered for sale through a real estate agent. A few lots were sold between 1937 and 1943. 27 lots were sold in 1944 and 7 in 1945. The Court held that the losses sustained as a result of these sales were capital losses, saying in part:

"The evidence is wholly insufficient to show any sustained real estate business on the part of the taxpayer. Even if there could be any possible room for disagreement as to the above review of the evidence, clearly there can be no dispute of the proposition that under the evidence here there is no basis for the finding that there were sufficient sales transactions to show that such sales of real estate were an ordinary course of business

of the taxpayer * * * The conclusion is inescapable that the sale of the lots was most extraordinary and not at all ordinary, and there was no ordinary course of business as to lot sales * * *''

It is equally clear that Samuel W. King was an independent contractor and not Petitioner's agent. In *Smith v. Dunn*, 224 F (2d) 353 (CA 5, 1955), the taxpayer owned a large tract of land which he inherited and which had been in the family for more than fifty years. He was a practicing architect; he had never engaged in the real estate business and had no office except that in which he practiced his profession. In 1946, with the intent of liquidating his holdings in the tract, he decided that it should be subdivided into lots and he employed an engineer who made the surveys and the subdivision. At that time the tract was undeveloped except for two roads running through it. The taxpayer also employed a real estate broker named Duffee to handle the sale of the lots. He made suggestions concerning the size of the lots and the best manner of making the subdivision and a sales price of the lots was discussed and tentatively agreed upon. Lots adjacent to the existing roads were first sold and thereafter two additional streets were opened, water mains installed and other improvements made, the total cost of which amounted to approximately \$32,000. Duffee was to have ten per cent commission, to advertise according to his own ideas, to fix the prices in line with the general agreement had at the outset, to pay all expenses and to remit to the taxpayer the net balance. Duffee employed his own salesmen, decided

upon and arranged for his own advertisements in his own name, developed his own clientele, and made sales to customers sought out and chosen by him alone. The Court decided that Duffee was an independent contractor and that the gains realized by the taxpayer from the sale of the lots were capital gains. Unquestionably the facts of *Smith v. Dunn* fall squarely in line with the facts of the instant case.

CONCLUSION.

The Tax Court of the United States has erred in determining that the Petitioner's homestead, a substantial portion of which was sold during the calendar years 1946 and 1947, had been held by him primarily for sale to customers in the ordinary course of his trade or business, and in failing to determine instead, that the said land was a capital asset.

The Tax Court of the United States has erred in determining that the gains realized by the Petitioner from sales of a substantial portion of his homestead during the calendar years 1946 and 1947 were ordinary income, and in failing to determine instead, that the said gains were long-term capital gains.

The Tax Court of the United States has erred in determining that there are deficiencies of \$10,799.76 and \$1,105.69, respectively, in the Petitioner's returns of income taxes for the calendar years 1946 and 1947, and in failing to determine instead, that there is a deficiency of \$184.04 in the Petitioner's return of

income tax for the calendar year 1946 and that Petitioner's original return of income tax for the calendar year 1947 was correct.

Dated, Honolulu, Hawaii,
February 25, 1957.

SAMUEL P. KING,
Attorney for Petitioner.

No. 15229

In the United States Court of Appeals
for the Ninth Circuit

STEPHEN G. ACHONG, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the
Tax Court of the United States

BRIEF FOR THE RESPONDENT

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FILED

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 15229

STEPHEN G. ACHONG, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum opinion of the Tax Court has not been officially reported. (R. 42-48.)

JURISDICTION

This petition for review (R. 49-50) involves federal income taxes for the taxable years 1946 and 1947. On March 14, 1951, the Commissioner of Internal Revenue mailed to the taxpayer notice of deficiencies in income taxes in the total amount of \$11,905.45. (R. 11-15.) Within 150 days thereafter and on April 2, 1951, the taxpayer filed a petition with the

Tax Court for a redetermination of that deficiency under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 3-15.) The decision of the Tax Court was entered March 27, 1956, and served March 29, 1956. (R. 48.) The case is brought to this Court by a petition for review filed June 26, 1956. (R. 49-50.) Jurisdiction is conferred in this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the Tax Court erred in holding that income realized from the sale of taxpayer's subdivided homestead land constituted ordinary income rather than capital gain.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *Definitions*—As used in this chapter—

(1) [as amended by Section 151(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Capital Assets*.—The term “capital assets” means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, * * * or real property used in the trade or business of the taxpayer.

* * * *

(26 U.S.C. 1952 ed., Sec. 117.)

STATEMENT

The facts as found by the Tax Court (R. 42-46) were nearly all stipulated (R. 18-27, 42) and may be summarized as follows:

The taxpayer, a citizen of the United States, is a resident of Honolulu, Territory of Hawaii. (R. 42.) He was employed as a cashier by a meat market from 1914 until his retirement in 1950. (R. 43.)

In 1923 the taxpayer was issued a land patent deed to 11.55 net acres of Government land at Halekou, Territory of Hawaii. (R. 19, 43.) In 1915 the taxpayer erected a dwelling on the homesteaded land and has since occupied the dwelling as his home. From time to time until 1946 the taxpayer leased under short-term agreements portions of the land to various tenants for farming purposes. He has never owned any other real estate. (R. 43.)

In 1946 Samuel W. King, a real estate broker, discussed with the taxpayer the sale of his homestead property, and on June 27, 1946, a written agreement was entered into between them. The agreement describes King as "a licensed real estate broker experienced in matters relating to sales of real estate." It provides that the taxpayer grant to King the exclusive right, power, and authority to prepare for sale and to sell the taxpayer's 11.55 acres. (R. 43.)

Under the terms of the agreement King was to hire and supervise surveyors and contractors as needed for preliminary planning and for putting the property in condition for sale in accordance with any approved plan of subdivision, the final plan of sub-

division to be subject to taxpayer's approval. Any plan of improvement was likewise subject to taxpayer's approval as to cost. (R. 43.)

King was to be reimbursed by taxpayer for all expenses of preparing the property for sale, including without limitation the cost of surveying, mapping, improving the property and perfecting title. King was to pay all costs of promotion, advertising and all other costs necessary for the sale. (R. 43-44.)

The agreed sales price was to be not less than an average of 25 cents per square foot, the final prices and terms of sale to be agreed upon. King was to receive 10 per cent commission of the gross sale and 2-1/2 per cent of monthly payments on account of sales on terms other than for cash. (R. 44.)

King was to keep complete records and books of account which were to be open to taxpayer's inspection. (R. 44.)

Pursuant to the agreement, King prepared a plan of proposed subdivision which was approved by the taxpayer. On August 1, 1946, the City Planning Commission of the City of Honolulu gave preliminary approval and on January 15, 1948, gave final approval to the plan of subdivision. (R. 44.)

On October 22, 1946, King, with the approval of the taxpayer, entered into a contract with the Paul Low Engineering & Construction Company for the construction of the necessary improvements. Costs of the survey, subdivision, construction and file plans, and final staking out were charged and paid for separately. Between November 25, 1946, and February 17, 1947, the engineering company billed to

King and was paid the aggregate amount of \$32,000. The charges for surveying, etc., paid by King totaled \$3,000. All these payments were charged to the account of the taxpayer on the books of King. (R. 44-45.)

The taxpayer reserved lots 16, 32 and 33. Lot 16 included the dwelling occupied by taxpayer. Lots 32 and 33 were reserved for future business use. (R. 45.) All the 30 remaining lots were sold. (R. 22.)

King prepared forms to be used in connection with the sale of lots. These forms included a deposit receipt and contract, deed and mortgage. During the period July 18, 1946, to November 19, 1946, deposit receipt and contract forms were executed by purchasers for the 30 lots offered for sale. King received all payments, processed all papers, and made all disbursements. He made appropriate entries in taxpayer's account and rendered periodic statements to taxpayer. (R. 45.)

All sales were made by King without advertising of any kind and no "For Sale" signs were erected on the property. King, however, maintained a real estate office which indicated he had property of the type here in question for sale. All the lots were sold through the activities of King either by contacting persons whom he believed to be prospective purchasers or by suggesting to persons contacting him that the lots were for sale. On occasion prospective purchasers contacted taxpayer who referred them to King. Taxpayer took no part in negotiating any sales. (R. 45.)

The lots in question were lands held by taxpayer primarily for sale to customers in the ordinary course of his trade or business, and the gain realized from the sales in the taxable years involved is taxable as ordinary income. (R. 46.)

In his returns for the years 1946 and 1947 taxpayer elected to return the gains from the sale of lots on the installment basis. The gain realized in 1946 was \$35,199.48, and in 1947 was \$6,504.39, 50 percent of which was taken into account as long term capital gain. The Commissioner of Internal Revenue determined that the total gain realized in the respective taxable years was ordinary income (R. 45-46) and, accordingly, mailed to the taxpayer notice of deficiencies in the total amount of \$11,905.45, of which \$11,721.41 is here in dispute (R. 18). The taxpayer timely petitioned the Tax Court for a redetermination (R. 3-15), and after trial based on the stipulation of the parties and testimony of the taxpayer, the Tax Court entered a decision in favor of the Commissioner (R. 48). It is from this decision that the taxpayer petitions this Court for review. (R. 94-50.)

SUMMARY OF ARGUMENT

Whether or not the taxpayer is entitled to report as capital gain the income realized by him from the sale of his subdivided homestead property depends upon whether or not such property is a capital asset as set forth by Section 117(a) of the Internal Revenue Code of 1939. That section excludes from the definition of capital asset that "property held by the

taxpayer primarily for sale to customers in the ordinary course of his trade or business.”

The finding of fact by the Tax Court that the taxpayer’s subdivided real estate was held for sale to customers is amply supported by the evidence and by the holding of this Court in *Richards v. Commissioner*, 81 F. 2d 369.

While the taxpayer conducted his business through an agent, he maintained control over the actions of the agent in several important aspects: he had a right to approve any final plan of subdivision both as to substance and cost; there had to be agreement between them upon final prices and terms of sale; books of account were to be open to taxpayer’s inspection; and periodic statements were to be rendered to the taxpayer. The taxpayer was to reimburse the agent for all expenses of preparing the property for sale, including cost of surveying, mapping and improving the property and perfecting title.

Although the property was not originally purchased for subdividing and sale to customers, it was so held at the time immediately prior to the sale and it is this latter time which is determinative as to whether or not the property was a capital asset. By his actions in subdividing and improving his property the taxpayer went into the business of selling lots. The asserted fact that it was not necessary for the taxpayer or his agent to put on a hard selling campaign does not change the situation, and it should be noted that the agent had a real estate office which indicated in itself that he had property of this type for sale.

The taxpayer could possibly have sold his property without any improvements and without subdividing it and received capital gain treatment thereon. But he chose instead to substantially improve and subdivide the property in order to reap the benefits of increased selling prices. By selecting this method of disposal the taxpayer submitted the property to customers in the ordinary course of his trade or business. Therefore he is not entitled to capital gain treatment on the income realized, and the decision of the Tax Court should be affirmed.

ARGUMENT

The Taxpayer's Real Estate Subdivision Constituted Property Held By Him Primarily For Sale To Customers In the Ordinary Course of His Trade or Business and Therefore Income Realized From the Sale Thereof Is Ordinary Income

Whether or not the taxpayer is entitled to report as capital gain the income realized by him from the sale of his subdivided homestead property depends upon whether or not such property falls within the definition of a capital asset as set forth by Section 117(a) of the Internal Revenue Code of 1939, *supra*.¹ The section provides in part that—

(1) *Capital Assets*.—The term “capital assets” means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade

¹ References to “Code” or “Internal Revenue Code” refer to the Internal Revenue Code of 1939 unless otherwise noted.

of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or *property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business*, * * * or real property used in the trade or business. (Emphasis supplied.)

The Tax Court found that the taxpayer's real estate was property held "primarily for sale to customers in the ordinary course of his trade or business," and, therefore, in effect, that the property did not constitute a capital asset within the meaning of the statute. This finding of fact, it is submitted, is amply supported both by the evidence and by the holdings in analogous cases decided by this and other courts. In *Friend v. Commissioner*, 198 F. 2d 285, 289 (C.A. 10th), it was stated that:

It is the well settled rule that whether property sold or otherwise disposed of by a taxpayer was held by him for sale to customers in the ordinary course of his trade or business, within the meaning of section 117, is essentially a question of fact. *Rubino v. Commissioner*, 9 Cir., 186 F. 2d 304, certiorari denied, 342 U.S. 814, 72 S. Ct. 28; *King v. Commissioner*, 5 Cir., 189 F. 2d 122, certiorari denied, 342 U.S. 829, 72 S. Ct. 54; *Mauldin v. Commissioner*, *supra*. It is the function of the Tax Court to weigh evidence, draw inferences, resolve conflicts, and determine facts. And a finding of fact made by that Court will not be disturbed on review if it is sustained by substantial evidence and is not clearly wrong. *Helvering v. National Gro-*

cery Co., 304 U.S. 282, 58 S. Ct. 932, 82 L. Ed. 1346; *Commissioner of Internal Revenue v. Scottish American Investment Co.*, 323 U.S. 119, 65 S. Ct. 169, 89 L. Ed. 113.

The fact that the parties are in substantial agreement as to most of the facts in this case does not change the situation. "It is true that where the facts are not in dispute this court may draw inferences of its own. But the ultimate question is whether the findings are supported by the record." *Rollingwood Corp. v. Commissioner*, 190 F. 2d 263 (C.A. 9th). Here the record well supports the findings of the Tax Court.

Before reviewing the evidence presented in this case, it is worthwhile to consider the factual situation in a case which has long been considered a landmark in this area of tax law. *Richards v. Commissioner*, 81 F. 2d 369, decided by this Court, is one of the early basic cases determining the status of real property such as that here involved. Interestingly enough, it is not cited by the taxpayer although its facts are exceedingly similar to those at bar. In *Richards*, the taxpayer was engaged in the business of raising and marketing farm products, and in connection therewith purchased various tracts of land. At the time of the purchase the tracts of land lay in a very productive farming area, and the products of adjacent lands, together with the products of the taxpayer's lands, enabled him to make shipments in carload lots. Increased real estate activity in the area, however, soon changed the nature of the land, with the result that the adjacent property

began to be subdivided and sold. Taxpayer's property rapidly increased in value, and the rise in prices made the use of the lands for gardening purposes unprofitable. Additionally, the taxpayer was deprived of a base from which to ship his vegetables in carload lots. As a result of these events, the taxpayer decided to subdivide his lands, and appointed an agent to effectuate the subdivision. The taxpayer personally did not take part in either the subdividing or the selling of the lots, and he was not licensed as a broker to buy or sell real estate. The determination of whether or not the income realized from the sale of these lots constituted ordinary income or was a capital gain depended on whether or not the lots were "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." This Court held that the reason for which the lots were "held" rather than the purpose of the original purchase of the land was determinative. It also rejected the taxpayer's contention that the sales constituted liquidation of a capital asset, and accordingly held that the taxpayer was engaged in the business of selling real estate and the income realized therefrom was ordinary income.

The resemblance of the present case to *Richards* is marked. In this case, as in *Richards* the taxpayer was not a real estate broker. The business activities of the taxpayer revolved mainly around his occupation as a cashier in a meat market. It is, however, well settled by *Richards* and other cases that one may have more than one occupation. *Friend v. Com-*

missioner, supra; *Snell v. Commissioner*, 97 F. 2d 891 (C.A. 5th); *Oliver v. Commissioner*, 138 F. 2d 910 (C.A. 4th); *DiLisio v. Vidal*, 233 F. 2d 909 (C.A. 10th). Thus, any reliance the taxpayer places upon the alleged fact that his chief activity was centered at the meat market (Br. 21, 23) is misplaced.

It is also claimed by the taxpayer that he personally did not take an active part in selling the land. (Br. 21, 23.) Neither, however, did the taxpayer in *Richards*. In both instances, the fact that the taxpayer conducted his business through an agent does not serve to make the taxpayer any the less engaged in the business. See *Fackler v. Commissioner*, 133 F. 2d 509 (C.A. 6th). The taxpayer maintained control over the actions of the real estate agent in relation to the subdivision in several important aspects. The right to approve any final plan of subdivision was in the taxpayer (R. 43); plans of improvement were to be subject to his approval as to cost (R. 43); the taxpayer and his agent were to agree upon the final prices and terms of sale (R. 44). In addition, the books of account were to be open to the taxpayer's inspection (R. 44) and periodic statements were to be rendered to the taxpayer by the agent (R. 45). It was agreed that the taxpayer was to reimburse the agent for all expenses of preparing the property for sale, including without limitation the cost of surveying, mapping, and improving the property and perfecting title. (R. 43-44.) All payments made by the agent to the engineering company were charged to the taxpayer on the books of the agent. (R. 44-45.) The above enumer-

ated facts clearly negate the contention of the taxpayer that the agent, Samuel W. King, was an independent contractor (Br. 25) and indeed the Tax Court specifically found to the contrary, correctly stating (R. 47), "Nor was King an independent contractor since his major activities were subject to the approval of petitioner." Thus even though the taxpayer himself expended only a minimal amount of time on the subdividing and sale of his lots (compare *DiLisio v. Vidal, supra*), he was still engaged in the business through the activities of his agent, Samuel W. King.² In *Welch v. Solomon*, 99 F. 2d 41, 43, this Court said:

The personal attention which a taxpayer gives to a business is certainly not decisive as to whether a resulting profit is ordinary income or capital gain. One may conduct a business through others, his agents, representatives, or employers. The business is nonetheless his because he chooses to let others bear all of the burdens of management.

See also *Harry P. Gamble, Jr. v. Commissioner* (C.A. 5th), decided March 21, 1957.

The Commissioner is willing to concede for the purposes of this argument that the taxpayer did not originally acquire his homestead with the intention of engaging in the business of subdividing and selling it. But the statute by its terms excludes from the definition of a capital asset property "held"

² Compare *Smith v. Dunn*, 224 F. 2d 353 (C.A. 5th), where the taxpayer maintained no supervision or control over prices, advertising or activities of the real estate broker.

by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. As this Court pointed out in *Richards, supra*, the statute does not read property "acquired" for sale to customers, and to so hold would be to ignore the word "held" in the statute. The important time period for purposes of deciding this particular case is not 1914 when the taxpayer first acquired an interest in the land, nor is it 1923 when he received a land patent deed. The reason for which the land was held *at the time of the sales* is determinative as to whether or not the land was held for sale in the ordinary course of trade or business. And even more, the Commissioner will agree for purposes of argument with the taxpayer's statement (Br. 17) that *if* in 1946 the taxpayer had sold his entire homestead to one buyer without causing it to be subdivided, any gain realized would have been capital gain. But the suppositious "if" of the taxpayer changes the facts sufficiently to completely change the result. Here the taxpayer did not sell his property in one piece. What did he do? He embarked upon a venture which completely changed the character of his property and which completely changed the legal nature of the property so far as the laws of taxation are concerned. He subdivided his property into 33 separate lots, making the necessary improvements,³

³ The taxpayer's statement that all sales were consummated before any improvements were actually constructed (Br. 21) while correct, is misleading. The stipulation in this case makes it clear that the lots were sold "on the representation that improvements would be constructed." (R. 27.)

surveying and mapping, and perfecting title. He had prepared a plan of subdivision and presented it to the city planing commission for approval. He entered into a contract with an engineering company for the construction of necessary improvements, and paid them \$32,000 through his agent. He also paid surveying charges. He had forms prepared for use in connection with the sale of lots, including deposit receipt and contract, deed and mortgage. While neither the taxpayer nor his agent advertised the sale of the lots, the agent maintained a real estate office which indicated that he had property for sale of the type here in question. The picture is clear. By these actions the taxpayer went into the business of selling lots. Such activities were designed, not to liquidate a capital asset,⁴ but to get into a high-

⁴ It has by now been made clear that terming the transaction a liquidation of capital assets is not in itself sufficient to change the result. This Court in *Ehrman v. Commissioner*, 120 F. 2d 607, 610, certiorari denied, 314 U.S. 668, stated:

This court has heretofore in *Richards v. Commissioner*, 9 Cir., 81 F. 2d 369, 106 A.L.R. 249, and in *Commissioner v. Boeing*, 9 Cir., 106 F. 2d 305, rejected the liquidation test in determining whether or not a taxpayer is carrying on a trade or business. In the *Boeing* case, *supra*, 106 F. 2d page 309, we laid down the test: "From the cases it would appear that the facts necessary to create the status of one engaged in a 'trade or business' revolve largely around the frequency or continuity of the transactions claimed to result in a 'business' status." We see no reason for departing from these decisions and now holding that the fact that property is sold for purposes of liquidation forecloses a determination that a "trade or business" is being

priced salable condition a homestead property which had substantially increased in value. That the taxpayer was successful in his endeavors is obvious from the fact that he quickly sold all of the lots in his subdivision except the three which he retained for his own purposes. The asserted fact that it was not necessary for the taxpayer or his agent to put on a hard selling campaign certainly does not change the situation. The seller's market was good, there was a demand for the lots, and it was not necessary to use high pressure methods to sell them.⁵ But a rela-

conducted by the seller. See also *Welch v. Solomon*, 9 Cir., 99 F. 2d 41. ,

* * * *

The sole question is—were the taxpayers in the business of subdividing real estate?

Compare *White v. Commissioner*, 172 F. 2d 629, 630 (C.A. 5th) in which the court stated:

The gist of the court's holding in the *Farley* case, in which we concur, was that where the liquidation of an asset is accompanied by extensive development and sales activity, the mere fact of liquidation does not preclude the existence of a trade or business; but, where the elements of development and sales activity are absent, the fact of liquidation may not be disregarded.

Even applying the liquidation doctrine of the Fifth Circuit, the taxpayer here would not qualify for capital gains treatment because of his improvements to and development of the land.

⁵ Compare *Fahs v. Crawford*, 161 F. 2d 315 (C.A. 5th), extensively quoted as authority by taxpayer. In *Fahs*, the taxpayer purchased as an investment a tract of land which was already subdivided. After various schemes to sell the tract en bloc were unsuccessful, he made only those further improvements as ~~was~~ necessary to make the property salable. In the case at bar the taxpayer has nowhere shown any

tively passive selling policy, if it may even be said that such was the case here, does not in itself rule out the fact that the property was held for sale in the ordinary course of business. *Mauldin v. Commissioner*, 195 F. 2d 714 (C.A. 10th). And of course it should be noted that the agent had a real estate office which indicated in itself that he had property of this type for sale.

To summarize, therefore, and as the Tax Court stated in its opinion (R. 47) :

Petitioner chose not to sell the property in the condition in which it was acquired and thus have the benefit of the preferred treatment of capital gains, but to subdivide it and make improvements to reap the benefits of increased selling prices.

Thus the taxpayer resorted to a method of disposal which required that the property be submitted to customers in the ordinary course of a trade or business. See *Palos Verdes Corp. v. United States*, 201 F. 2d 256 (C.A. 9th). He clearly is not entitled to capital gain treatment on the gain he has realized.

efforts on his part to sell his property as a whole nor has he shown that it would have been unfeasible to have so attempted.

CONCLUSION

The decision of the Tax Court was correct and should be affirmed.

Respectfully submitted,

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APRIL, 1957.

No. 15230

United States
Court of Appeals
for the Ninth Circuit

MORGAN STIVERS,

Appellant,

VS.

NATIONAL AMERICAN INSURANCE COM-
PANY, a Corporation, et al.,

Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

DEC - 3 1956

No. 15230

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Superior Court of the State of California
in and for the County of Los Angeles

No. Lb. C. 21,601

MORGAN A. STIVERS,

Plaintiff,

vs.

NATIONAL AMERICAN INSURANCE COM-
PANY, a Corporation; GIRARD INSUR-
ANCE COMPANY OF PHILADELPHIA,
PENNSYLVANIA, a Corporation; THE IN-
SURANCE COMPANY OF THE STATE OF
PENNSYLVANIA, a Corporation; QUEEN
INSURANCE COMPANY OF AMERICA, a
Corporation, and DOES I TO X, Inclusive,
Defendants.

COMPLAINT

(Damages, Breach of Contract)

Plaintiff for cause of action against Defendants,
who are joined as Defendants pursuant to Section
383 of California Code of Civil Procedures, alleges
as follows:

For a First Cause of Action

I.

Plaintiff, Morgan A. Stivers, is now and at all
times herein mentioned was the owner and sole
proprietor of Stivers Packing Company located at
Sides Station, three miles north of Lindsay, Tulare
County, California.

II.

That at all times hereafter stated, the Defendant, National American Insurance Company, was and now is an insurance [13*] corporation organized and existing under the laws of a State other than California, and said Defendant, National American Insurance Company, now is and has been at all times herein mentioned licensed to transact fire insurance business in the State of California.

III.

That at all times herein mentioned Truman B. Stivers and the General Adjustment Bureau, Inc., a corporation, were the duly authorized agents, servants and employees of the Defendant, National American Insurance Company.

IV.

That at the time of making said insurance as hereinafter described and until the fire hereinafter mentioned, the Plaintiff was the owner in fee of the property so insured and described as packing house and loading platform, bunk house and storage building, and the machinery, equipment, field supplies and boxes situated therein located at Sides Station three miles north of Lindsay, Tulare County, California.

V.

That on or about the 18th day of November, 1952, at Pasadena, California, in consideration of pay-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

ment by the Plaintiff to the Defendant, National American Insurance Company, of the premium of \$261.00, the Defendant, National American Insurance Company, made and issued its policy of insurance in writing entitled California Standard Form Fire Insurance Policy, No. 70997, a copy of which is annexed and made a part of this complaint and marked Exhibit "A" and thereby insured the Plaintiff against loss or damage by fire to the amount of \$10,000.00, as follows: Packing house and loading platform in the amount of \$5,000.00; stock consisting principally of field supplies and boxes in the amount of \$1,500.00, bunk house in the amount of \$2,000.00, and storage building in the amount of \$1,500.00. Said policy was delivered [14] to the Plaintiff at Long Beach, California; and loss, if any, to be paid by said Defendant under said policy was made payable to the named insured at Long Beach, California.

VI.

That on the 13th day of October, 1954, and while said policy was still in force, said packing house and loading platform, equipment, field supplies and boxes, and storage building situated on the afore-said premises were totally destroyed by fire.

VII.

That the Plaintiff's loss thereby was \$166,642.00, as follows: Packing house and loading platform in the amount of \$65,000.00; equipment in the amount of \$67,242.00; stock, including field supplies and

boxes, in the amount of \$25,150.00, and storage buildings in the amount of \$9,250.00.

VIII.

That on or about the 16th day of December, 1954, the Defendant National American Insurance Company, by its agent duly authorized thereto, waived the condition of said policy by which proofs of loss were required to be presented within sixty (60) days of said loss and extended the time for filing said proofs of loss to and including the 15th day of January, 1955; that thereafter on or about the 21st day of December, 1954, Plaintiff furnished the Defendant, National American Insurance Company, proofs of his said loss and interest; that said Defendant, National American Insurance Company, estopped itself from objecting to the contents of said proofs of loss so furnished by the Plaintiff by retaining same without objection thereto and by refusal to pay the Plaintiff any sum whatever.

IX.

That the Plaintiff duly fulfilled all of the conditions of said policy of insurance on his part. [15]

X.

That under the terms of said policy, other insurance concurrent therewith was permitted; that Plaintiff had other fire insurance upon said property at the time of said fire, and that the aggregate thereof, including the insurance by the Defendant, National American Insurance Company, was in the

amount of \$40,000.00, as follows: Packing house and loading platform in the sum of \$18,000.00; equipment in the sum of \$12,500.00; stock, including field supplies and boxes, in the sum of \$5,000.00; storage building and bunk house in the sum of \$4,500.00; that Defendant's proportionate liability for said loss and damage to Plaintiff is the sum of at least \$8,000.00.

XI.

That the Defendant, National American Insurance Company, has not paid the said loss nor any part thereof, and the same is now due from the Defendant to the Plaintiff.

For a Second Cause of Action

I.

Plaintiff realleges the allegations of Paragraphs I, II, III, IV, V, VI, VII, VIII, X and XI of the First Cause of Action as fully as though set forth at length.

II.

That Plaintiff duly fulfilled all of the conditions of said policy of insurance on his part, except that the Defendant, National American Insurance Company, at the time of the issuance of said policy thereto, waived the condition of said policy by which said insurance was forfeited if said premises were permitted to remain unoccupied but not vacant in excess of ten consecutive months, and released and discharged the Plaintiff from the performance thereof, and consented that the Plaintiff maintain

a watchman on said premises insured by said policy in lieu of continuous [16] occupancy beyond ten consecutive months; that pursuant to said agreement of said Defendant, National Insurance Company, the Plaintiff hired and maintained a watchman on said premises at all times after the issuance of said policy and until said property was destroyed by fire.

For a Third Cause of Action

I.

Plaintiff realleges the allegations of Paragraphs I, III, IV, VI and VII of the First Cause of Action as fully as though set forth at length.

II.

That at all times hereafter stated, the Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, was and now is an insurance corporation organized and existing under the laws of a State other than California, and said Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, now is and has been at all times herein mentioned licensed to transact fire insurance business in the State of California.

III.

That on or about the 1st day of December, 1952, at Pasadena, California, in consideration of payment by the Plaintiff to the Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, made and issued its policy of insurance in writing entitled said policy of insurance issued by said De-

fendant was substantially identical in form to Exhibit "A" attached hereto, except as to the name of the issuing company, the number of the policy, the gross premium, the amount of the insurance, the issuing agent, the inclusion of Raymond K. Stivers as a named insured, and the fact a Lenders Loss Payable Endorsement was attached thereto; that by the issuance of said policy the Defendant insured the [17] Plaintiff against loss or damage by fire to the amount of \$10,000.00, as follows: Packing house and loading platform in the amount of \$5,000.00 and equipment in the amount of \$5,000.00. Said policy was delivered to the Plaintiff at Long Beach, California; and loss, if any, to be paid by said Defendant under said policy was made payable to the named insured at Long Beach, California.

IV.

That said policy of insurance so issued by said Girard Insurance Company of Philadelphia, Pennsylvania, was issued to renew or replace Policy No. 102 theretofore issued by said Girard Insurance Company of Philadelphia, Pennsylvania; that by mutual mistake of the parties said policy was made to read in part: "Does insure Morgan A. Stivers and Raymond K. Stivers, doing business as Stivers Packing Company"; that in truth and in fact, said policy should have read: "Does Insure Morgan A. Stivers, Doing Business as Stivers Packing Company"; that prior to the issuance of said renewal policy sued on herein, all right, title and interest of the said Raymond K. Stivers in said premises

had been assigned to and acquired by Morgan A. Stivers, Plaintiff herein. Plaintiff prays that the Court reform said policy by striking therefrom the name of Raymond K. Stivers as a person insured under the said policy.

V.

That at the time said policy of insurance was issued there was appended thereto a Lenders Loss Payable Endorsement, providing that loss or damage, if any, under said policy shall be paid to the Farmers & Merchants Bank of Long Beach; that prior to the issuance of said renewal policy all interest of the said Farmers & Merchants Bank of Long Beach as lender, or otherwise, was paid in full; that said Farmers & Merchants Bank of Long Beach by endorsement in writing on said Lenders Loss Payable Endorsement [18] have released any and all interest in said policy.

VI.

That on or about the 16th day of December, 1954, the Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, by its agent duly authorized thereto, waived the condition of said policy by which proofs of loss were required to be presented within sixty (60) days of said loss and extended the time for filing said proofs of loss to and including the 12th day of January, 1955; that thereafter on or about the 21st day of December, 1954, Plaintiff furnished the Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, proofs of his said loss and interest; that said

Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, has estopped itself from objecting to the contents of said proofs of loss so furnished by the Plaintiff by retaining same without objection thereto and by refusal to pay the Plaintiff any sum whatever.

VII.

That the Plaintiff duly fulfilled all of the conditions of said policy of insurance on his part.

VIII.

That under the terms of said policy, other insurance, concurrent therewith was permitted; that Plaintiff had other fire insurance upon said property at the time of said fire, and that the aggregate thereof, including the insurance by the Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, was in the sum of \$40,000.00, as follows: Packing house and loading platform in the sum of \$18,000.00; equipment in the sum of \$12,500.00; stock, including field supplies and boxes, in the sum of \$5,000.00; storage building and bunk house in the sum of \$4,500.00; that Defendant's proportionate liability for said loss and damage to Plaintiff is the sum of at least \$10,000.00. [19]

IX.

That the Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, has not paid the said loss nor any part thereof, and the same is now due from the defendant to the Plaintiff.

For a Fourth Cause of Action

I.

Plaintiff realleges the allegations of Paragraphs I, III, IV, VI and VII of Plaintiff's First Cause of Action as fully as though set forth at length.

II.

Plaintiff realleges the allegations of Paragraphs II, III, IV, V, VI, VIII and IX of Plaintiff's Third Cause of Action as fully as though set forth at length.

III.

That Plaintiff duly fulfilled all of the conditions of said policy of insurance on his part, except that the Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, by its agents duly authorized thereto, waived the condition of said policy by which said insurance was forfeited if said premises were permitted to remain unoccupied but not vacant in excess of ten consecutive months, and released and discharged the Plaintiff from the performance thereof, and consented that the Plaintiff maintain a watchman on said premises insured by said policy in lieu of continuous occupancy beyond ten consecutive months; that pursuant to said agreement of said Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, the Plaintiff hired and maintained a watchman on said premises at all times after the issuance of said policy and until said property was destroyed by fire. [20]

For a Fifth Cause of Action

I.

Plaintiff realleges the allegations of Paragraphs I, IV, VI and VII of Plaintiff's First Cause of Action as fully as though set forth at length.

II.

That at all times hereafter stated, the Defendant, The Insurance Company of the State of Pennsylvania, was and now is an insurance corporation organized and existing under the laws of a State other than California, and said Defendant, The Insurance Company of the State of Pennsylvania, now is and has been at all times herein mentioned licensed to transact fire insurance business in the State of California.

III.

That at all times herein mentioned Truman B. Stivers, Roy A. McMillan and The General Adjustment Bureau, Inc., a corporation, were the duly authorized agents, servants and employees of the Defendant, The Insurance Company of the State of Pennsylvania.

IV.

That on or about the 1st day of December, 1952, at Altadena, California, in consideration of payment by the Plaintiff to the Defendant, The Insurance Company of the State of Pennsylvania, of the premium of \$243.75, the Defendant, The Insurance Company of the State of Pennsylvania, made and issued its policy of insurance in writing entitled

California Standard Form Fire Insurance Policy, No. 101260, which said policy of insurance issued by said Defendant was substantially identical in form to Exhibit "A" attached hereto, except as the name of the issuing company, the number of the policy, the gross premium, the amount of the insurance, the issuing agent, and the fact a Lenders Loss Payable Endorsement was attached thereto; that by the issuance of said [21] policy the Defendant insured the Plaintiff against loss or damage by fire to the amount of \$7,500.00, as follows: Packing house and loading platform in the amount of \$3,000.00; equipment in the amount of \$2,500.00; stock, consisting principally of field supplies and boxes, in the amount of \$1,500.00, and storage buildings in the amount of \$500.00. Said policy was delivered to the Plaintiff at Long Beach, California; and loss, if any, to be paid by said Defendant under said policy was made payable to the named insured at Long Beach, California.

V.

That at the time said policy of insurance was issued there was appended thereto a Lenders Loss Payable Endorsement, providing that loss or damage, if any, under said policy shall be paid to the Farmers & Merchants Bank of Long Beach; that prior to the issuance of said policy all interest of the said Farmers & Merchants Bank of Long Beach, as Lender, or otherwise, was paid in full; that said Farmers & Merchants Bank of Long Beach by en-

dorsement on said Lenders Loss Payable Rider have released any and all interest in said policy.

VI.

That on or about the 13th day of December, 1954, the Defendant, The Insurance Company of the State of Pennsylvania, by its agent duly authorized thereto, waived the condition of said policy by which proofs of loss were required to be presented within sixty (60) days of said loss and extended the time for filing said proofs of loss to and including the 12th day of January, 1955; that thereafter on or about the 21st day of December, 1954, Plaintiff furnished the Defendant, The Insurance Company of the State of Pennsylvania, proofs of his said loss and interest; that said Defendant, The Insurance Company of the State of Pennsylvania, estopped itself from objecting to the contents of said proofs of loss so furnished by the Plaintiff by retaining [22] same without objection thereto and by refusal to pay the Plaintiff any sum whatever.

VII.

That the Plaintiff duly fulfilled all of the conditions of said policy of insurance on his part.

VIII.

That under the terms of said policy, other insurance concurrent therewith was permitted; that Plaintiff had other fire insurance upon said property at the time of said fire, and that the aggregate thereof, including the insurance by the Defendant,

The Insurance Company of the State of Pennsylvania, was in the sum of \$40,000.00, as follows: Packing house and loading platform in the sum of \$18,000.00; equipment in the sum of \$12,500.00; stock, including field supplies and boxes, in the sum of \$5,000.00; storage building and bunk house in the sum of \$4,500.00; that Defendant's proportionate liability for said loss and damage to Plaintiff is the sum of at least \$7,500.00.

IX.

That the Defendant, The Insurance Company of the State of Pennsylvania, has not paid the said loss nor any part thereof, and the same is now due from the Defendant to the Plaintiff.

For a Sixth Cause of Action

I.

Plaintiff realleges the allegations of Paragraphs I, IV, VI and VII of Plaintiff's First Cause of Action as fully as though set forth at length.

II.

Plaintiff realleges the allegations of Paragraphs II, III, IV, V, VI, VIII and IX of Plaintiff's Fifth Cause of Action as fully as though set forth at length. [23]

III.

That Plaintiff duly fulfilled all of the conditions of said policy of insurance on his part, except that the Defendant, The Insurance Company of the State of Pennsylvania, by its agents duly authorized

thereto, waived the condition of said policy by which said insurance was forfeited if said premises were permitted to remain unoccupied but not vacant in excess of ten consecutive months, and released and discharged the Plaintiff from the performance thereof, and consented that the Plaintiff maintain a watchman on said premises insured by said policy in lieu of continuous occupancy beyond ten consecutive months; that pursuant to said agreement of said Defendant, The Insurance Company of the State of Pennsylvania, the Plaintiff hired and maintained a watchman on said premises at all times after the issuance of said policy and until said property was destroyed by fire.

For a Seventh Cause of Action

I.

Plaintiff realleges the allegations of Paragraphs I, IV, VI and VII of Plaintiff's First Cause of Action as fully as though set forth at length.

II.

That at all times hereafter stated, the Defendant, Queen Insurance Company of America, was and now is an insurance corporation organized and existing under the laws of a State other than California, and said Defendant, Queen Insurance Company of America, now is and has been at all times herein mentioned licensed to transact fire insurance business in the State of California.

III.

That at all times herein mentioned, Truman B. Stivers, Roy A. McMillan and The General Adjustment Bureau, Inc., a [24] corporation, were the duly authorized agents, servants and employees of the Defendant, Queen Insurance Company of America.

IV.

That on or about the 1st day of December, 1952, at Altadena, California, in consideration of payment by the Plaintiff to the Defendant, Queen Insurance Company of America, of the premium of \$406.25, the Defendant, Queen Insurance Company of America, made and issued its policy of insurance in writing entitled California Standard Form Fire Insurance Policy, No. 764197, which said policy of insurance issued by said Defendant was substantially identical in form to Exhibit "A" attached hereto, except as to the name of the issuing company, the number of the policy, the gross premium, the amount of the insurance, the issuing agent, and the fact a Lenders Loss Payable Endorsement was attached thereto; that by the issuance of said policy the Defendant insured the Plaintiff against loss or damage by fire to the amount of \$12,500.00, as follows: Packing house and loading platform in the amount of \$5,000.00; equipment in the amount of \$5,000.00; stock, consisting principally of field supplies and boxes, in the amount of \$2,000.00, and storage building in the amount of \$500.00. Said policy was delivered to the Plaintiff at Long Beach, California; and loss, if

any, to be paid by said Defendant under said policy was made payable to the named insured at Long Beach, California.

V.

That at the time said policy of insurance was issued there was appended thereto a Lenders Loss Payable Endorsement, providing that loss or damage, if any, under said policy shall be paid to the Farmers & Merchants Bank of Long Beach; that prior to the issuance of said policy all interest of the said Farmers & Merchants Bank of Long Beach as Lender, or otherwise, was paid in full; that said Farmers & Merchants Bank of Long Beach by endorsement on said Lenders Loss Payable Rider have released any and all interest [25] in said policy.

VI.

That on or about the 13th day of December, 1954, the Defendant, Queen Insurance Company of America, by its agent duly authorized thereto, waived the condition of said policy by which proofs of loss were required to be presented within sixty (60) days of said loss and extended the time for filing said proofs of loss to and including the 12th day of January, 1955; that thereafter on or about the 21st day of December, 1954, Plaintiff furnished the Defendant, Queen Insurance Company of America, proofs of his said loss and interest; that said Defendant, Queen Insurance Company of America, estopped itself from objecting to the contents of said proofs of loss so furnished by the Plaintiff by retaining same without objection

thereto and by refusal to pay the Plaintiff any sum whatever.

VII.

That the Plaintiff duly fulfilled all of the conditions of said policy of insurance on his part.

VIII.

That under the terms of said policy, other insurance concurrent therewith was permitted; that Plaintiff had other fire insurance upon said property at the time of said fire, and that the aggregate thereof, including the insurance by the Defendant, Queen Insurance Company of America, was in the sum of \$40,000.00, as follows: Packing house and loading platform in the sum of \$18,000.00; equipment in the sum of \$12,500.00; stock, including field supplies and boxes, in the sum of \$5,000.00; storage building and bunk house in the sum of \$4,500.00; that Defendant's proportionate liability for said loss and damage to Plaintiff is the sum of at least \$12,500.

IX.

That the Defendant, Queen Insurance Company of America, has not paid the said loss nor any part thereof, and the same is [26] now due from the Defendant to the Plaintiff.

For an Eighth Cause of Action

I.

Plaintiff realleges the allegations of Paragraphs I, IV, VI and VII of Plaintiff's First Cause of Action as fully as though set forth at length.

II.

Plaintiff realleges the allegations of Paragraphs II, III, IV, V, VI, VIII and IX of Plaintiff's Seventh Cause of Action as fully as though set forth at length.

III.

That Plaintiff duly fulfilled all of the conditions of said policy of insurance on his part, except that the Defendant, Queen Insurance Company of America, by its agents duly authorized thereto, waived the condition of said policy by which said insurance was forfeited if said premises were permitted to remain unoccupied but not vacant in excess of ten consecutive months, and released and discharged the Plaintiff from the performance thereof, and consented that the Plaintiff maintain a watchman on said premises insured by said policy in lieu of continuous occupancy beyond ten consecutive months; that pursuant to said agreement of said Defendant, Queen Insurance Company of America, the Plaintiff hired and maintained a watchman on said premises at all times after the issuance of said policy and until said property was destroyed by fire.

Wherefore, Plaintiff prays judgment, as follows:

1. Against the Defendant, National American Insurance Company, on the First and Second Causes of Action, damages in the sum of \$8,000.00, plus interest from December 21, 1954;

2. Against the Defendant, Girard Insurance Company of [27] America, on the Third and Fourth Causes of Action, as follows:

a. That the Court reform said policy of insurance as prayed for in Paragraph IV of the Third Cause of Action; and

b. For damages in the sum of \$10,000.00, plus interest from December 21, 1954;

3. Against the Defendant, The Insurance Company of the State of Pennsylvania, on the Fifth and Sixth Causes of Action, damages in the sum of \$7,500.00, plus interest from December 21, 1954;

4. Against the Defendant, Queen Insurance Company of America, on the Seventh and Eighth Causes of Action, damages in the sum of \$12,500.00, plus interest from December 21, 1954; and

5. Against all Defendants, costs of suit and such other and further relief as to the Court may seem just.

HARWOOD STUMP,
Attorney for Plaintiff.

Duly verified.

Complaint amended January 19, 1956. [28]

EXHIBIT "A"

California Standard Form Fire Insurance Policy
National American Insurance Company
Omaha, U.S.A.

Insurance Managers, Incorporated
H. F. Ahmanson & Company
704 S. Spring St., Los Angeles

Morgan A. Stivers, et al.

Buildings & Equipment, Description of Property
Property Located at Sides Station, 3 Miles North
of Lindsay, Tulare County, California

Policy No. 70997

Policy Commences: 12-1-52

Policy Expires: 12-1-55

For the Term of: 3 Yrs.

In the Amount of: 10,000.00

Rate: Vrs.

Premium: 261.00

California Standard Form Fire Insurance Policy
Stock Company

Date Issued: 11-18-52 RK

No. 70997

Old No.:

National American Insurance Company
Omaha, U.S.A.

Pacific Department

Los Angeles, California

Tentative

Fire & Lighting, Amount: \$10,000.00

Fire Rate: Various

Premium: \$216.00

Extended Coverage Rate: Various

Premium: \$45.00

Total Premium: \$261.00

Insurance is provided only against those perils and for only those coverages indicated above by a premium charge and against other perils and for other coverages when endorsed hereon or added hereto.

In Consideration of the Provisions and Stipulations Herein or Added Hereto and of the Above Specified Dollars Premium this Company, for the term of 3 Years from the 1st day of December, 1952, to the 1st day of December, 1955, at noon, Standard Time, at location of property involved, to an amount not exceeding the above specified dollars, does insure Morgan A. Stivers, Doing Business as Stivers Packing Co., and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all Loss by Fire, Lightning and by Removal

From Premises Endangered by the Perils Insured Against in This Policy, Except as Hereinafter Provided, to the property described hereinafter while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

In Witness Whereof, this company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized agent of this company at any place in California.

/s/ RAY F. STRYKER,
Secretary;

/s/ H. F. AHMANSON,
Chairman of the Board.

Countersigned at Pasadena, California, this 18th day of November, 1952.

/s/ TRUMAN B. STIVERS,
Agent.

Standard Forms Bureau Form 78 (July, 1950)

Building, Equipment and Stock Form

Attached to and forming part of Policy No. 70997
of the National American Insurance Company.

Issued to Morgan A. Stivers, et al.

Agency at: Pasadena, California.

Dated: December 1, 1952.

This policy covers the following described property, all situated at Sides Station, 3 Miles North of Lindsay, California, Tulare County, State of California.

Item 1. \$5,000.00 On the story Comp. roof Frame Building while occupied as Packing House and Loading Platform.

2.00/.45

Item 2. \$ Nil. On Equipment, pertaining to Insured's occupancy as
all only while contained in, on or attached to the above described building.

Item 3. \$1,500.00 On Stock, consisting principally of Field Supplies and Boxes, all only while contained in, on or attached to the above described building.

2.00/.45

Item 4. \$2,000.00 On Bunk House Situate: On Above Described Premises.

2.80/.45

Item 5. \$1,500.00 On Storage Building Situate: On Above Described Premises.

2.00/.45

6. Insurance attaches hereunder only to those items for which an amount is shown in the space provided therefore and not exceeding said amount under such item(s). For definition of terms "Building," "Equipment," "Stock," see Paragraph 7 below; for extensions and exclusions see Paragraphs Nos. 8 and 10 below.

7. Definition of Terms:

(I) Building: Building or structure in its entirety, including all fixtures and machinery used for the service of the building itself, provided such fixtures and machinery are contained in or attached to and constitute a part of the building; additions in contact therewith; platforms, chutes, conveyors, bridges, trestles, canopies, gangways, and similar exterior structures attached thereto and located on the above described premises, provided, that if the same connect with any other building or structure owned by the named Insured, then the insurance shall cover only such portion of the same situate on the above described premises as lies between the building covered under this policy and a point midway between it and such other building or structure; also (a) awnings, signs, door and window shades and screens, storm doors and storm windows; (b) cleaning and fire fighting apparatus; (c) janitors' supplies, tools and implements; (d) materials and supplies intended for use in construction, alterations or repairs of the building. Provided, however, that property described in (a), (b), (c) and (d) immediately above must be, at the time

of any loss, (1) the property of the named Insured who is the owner of the building; and (2) used for the maintenance or service of the building; and (3) contained in or attached to the building; and (4) not specifically covered under an item other than the "Building" item of this or any other policy.

(II) Equipment: Equipment and personal property of every description, and, provided the described building is not owned by the named Insured. "Tenant's Improvements and Betterments" installed or paid for by the named Insured; But Excluding, (1) Bullion, Manuscripts, and Machine Shop or Foundry Patterns, (2) Property (Whether Covered Under This Policy or Not) Included Within the Description or Definition of "Stock," (3) Property Kept for Sale, and (4) Property Covered Under the "Building" Item of This or Any Other Policy.

(III) Stock: Stock of goods, wares and merchandise of every description, manufactured, unmanufactured, or in process of manufacture; materials and supplies which enter in the manufacture, packing, handling, shipping and sale of same; advertising material; all being the property of the named Insured, or sold but not removed (it being understood that the actual cash value of stock sold but not removed shall be the Insured's selling price); and the Insured's interest in materials, labor and charges furnished, performed on or incurred in connection with the property of others.

8. Extension Clause: Personal property of the

kind and nature covered under any item hereof shall be covered under the respective item (a) while in, on, or under sidewalks, streets, platforms, alleyways or open spaces, provided such property (1) is located within fifty (50) feet of the described "Building," or (2) in the case of materials and supplies intended for use in construction, alterations or repairs of the described "Building," is located within one hundred (100) feet of said "Building"; and (b) while in or on cars and vehicles within three hundred (300) feet of the described "Building"; and (c) while in or on barges and scows or other vessels within one hundred (100) feet of the described premises. Provided That Property Covered by Marine, Inland Marine or Transportation Insurance of Any Kind, Shall Not Be Covered Under This Extension Clause.

9. Trust and Commission Clause: To the extent that the named Insured shall be liable by law for loss thereto or shall prior to loss have specifically assumed liability therefor, any item of this policy covering on personal property shall also cover property of the kind and nature described in such item, at the location(s) herein indicated, held in trust, or on consignment or commission, or on joint account with others, or left for storage or repairs.

10. Exclusion Clause: In Addition to Property Expressly Excluded From Coverage by Any Provision of This Form or Other Endorsement Attached to This Policy, the Following Are Not Covered Under Any Item of This Policy and Are

to Be Excluded in the Application of Any "Average Clause" or "Distribution Clause": Land Values, Gardens, Trees, Lawns, Plants, Shrubbery, Accounts, Bills, Currency, Deeds, Evidences of Debt, Money, Securities, Aircraft, Boats, Motor Vehicles.

Extended Coverage Endorsement, SFBF 202,
Attached

11. Loss, if any, under each item of this policy shall be adjusted with the Insured specifically named unless otherwise specified, (a) hereunder, (b) by written agreement, or (c) by endorsement hereon.

12. Loss, if any, under item(s) 1, 3, 4, 5 subject to all the terms and conditions of this policy, and to the written agreement, if any, between this Insurer and the following named Payee, is payable to Named Insured, whose mailing address is.....
.....

13. Average Clause (This Clause Void Unless Percentage Is Inserted): In Event of Loss to Property Described in Any Item of This Policy as to Which Item a Percentage Figure Is Inserted in This Clause, This Company Shall Be Liable for No Greater Proportion of Such Loss Than the Amount of Insurance Specified in Such Item Bears to the Following Percentage of the Actual Cash Value of the Property Described in Such Item at the Time of Loss, Nor for More Than the Proportion Which the Amount of Insurance Specified in Such Item

Bears to the Total Insurance on the Property Described in Such Item at the Time of Loss:

Per Cent (.....) Applying to Item No.

Per Cent (.....) Applying to Item No.

If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately.

14. Waiver of Inventory and Appraisement Clause: If any item of this policy is subject to the conditions of the Average Clause (Paragraph 13 hereof), it is also provided that when an aggregate claim for any loss to the property described in any such item of this policy is both less than Five Thousand Dollars (\$5,000.00) and less than two per cent (2%) of the total amount of insurance upon the property described in at the time such loss it shall not be necessary for the Insured to make a special inventory or appraisement of the undamaged property, But Nothing Herein Contained Shall Operate to Waive the Application of the Average Clause to Any Such Loss.

If this policy be divided into two or more items, the foregoing condition shall apply to each item separately.

The Provisions Printed on the Back of This Form Are Hereby Referred to and Made a Part Hereof.

/s/ TRUMAN B. STIVERS.

Provisions Referred to in and Made
Part of This Form (No. 70)

15. Excess Insurance Limitation Clause: No Item of This Policy Shall Attach to or Become Insurance Upon Any Property, Included Within the Description of Such Item, Which at the Time of Any Loss

(a) Is More Specifically Described and Covered Under Another Item of This Policy, or Under Any Other Policy Carried by or in the Name of the Insured Named Herein, or

(b) Being the Property of Others Is Covered by Insurance Carried by or in the Name of Others Than the Insured Named Herein, Until the Liability of Insurance Described Under (a) or (b) Has First Been Exhausted, and Shall Then Cover Only the Excess of Value of Such Property Over and Above the Amount Payable Under Such Other Insurance, Whether Collectible or Not. This Clause Shall Not Be Applicable to Property of Others for the Loss of Which the Insured Named Herein Is Liable by Law or Has Prior to Any Loss Specifically Assumed Liability.

16. Tenant's Improvements and Betterments Clause: "Tenant's Improvements and Betterments" (subject to the provisions of the paragraph hereof entitled "Equipment") are covered as property of the named Insured under the "Equipment" item of this policy, regardless of whether or not the same have or will become a permanent or integral part of the building(s) or the property of the building owner or lessor. The amount of loss on such "Ten-

ant's Improvements and Betterments" shall be determined on the basis of the actual cash value thereof at the time of loss, irrespective of any limitation upon the interest of the Insured therein resulting from any lease or rental agreement affecting the same. The insurance on such "Tenant's Improvements and Betterments" shall not be prejudiced, nor shall the amount recoverable for loss thereon be diminished, because of insurance covering on the same issued in the name of the owner of said building(s) or of others than the Insured named in this policy. This Policy, However, Shall Not Contribute to the Payment of Any Loss to "Tenants Improvements and Betterments" Covered Under Any Policy or Policies Issued in the Name of the Owner of Said Building(s) or of Others Than the Insured Named in This Policy.

17. Consequential Damage Assumption Clause: (To apply only if stock of merchandise, provisions or supplies in cold storage, which stock is subject to damage through change of temperature, are covered hereunder.) This Company (Subject to the Terms of This Policy) Shall Be Liable for Consequential Loss to Stock of Merchandise, Provisions and Supplies in Cold Storage Covered Hereunder Caused by Change of Temperature Resulting From Total or Partial Destruction by Any Peril Insured Against in This Policy, of Refrigerating or Cooling Apparatus, Connections or Supply Pipes Thereof, Unless Such Loss is Specifically Excluded as to Any Such Peril by Express Provisions of Any Form, Rider or Endorsement Attached to This Policy.

The Total Liability for Loss Caused by Any Peril Insured Against in This Policy and by Such Consequential Loss, Either Separately or Together, Shall in No Case Exceed the Total Amount of This Policy in Effect at the Time of Loss. If There Is Other Insurance Upon the Property Damaged Covering the Perils, or Any Thereof, Which Are Insured Against in This Policy, This Company Shall Be Liable Only for Such Proportion of Any Consequential Loss as the Amount Hereby Insured Bears to the Whole Amount of Insurance Thereon Whether Such Other Insurance Covers Against Consequential Loss or Not.

18. Breach of Warranty Clause: If a breach of any warranty or condition contained in any rider attached to or made a part of this policy shall occur, which breach by the terms of such warranty or condition shall operate to suspend or avoid this insurance, it is agreed that such suspension or avoidance due to such breach, shall be effective only during the continuance of such breach and then only as to the building, fire division, contents therein, or other separate location to which such warranty or condition has reference and in respect of which such breach occurs.

19. Subrogation Waiver Clause: This insurance shall not be prejudiced by agreement made by the named Insured releasing or waiving the named Insured's right of recovery against third parties responsible for the loss, under the following circumstances only:

I. If made before loss has occurred, such agreement may run in favor of any third party;

II. If Made After Loss Has Occurred, Such Agreement May Run Only in Favor of a Third Party Falling Within One of the Following Categories at the Time of Loss:

(a) A Third Party Insured Under This Policy; or

(b) A Corporation, Firm, or Entity (1) Owned or Controlled by the Named Insured or in Which the Named Insured Owns Capital Stock or Other Proprietary Interest, or (2) Owning or Controlling the Named Insured or Owning or Controlling Capital Stock or Other Proprietary Interest in the Named Insured;

III. Whether Made Before or After Loss Has Occurred, Such Agreement Must Release or Waive the Entire Right of Recovery of the Named Insured Against Such Third Party.

20. Automatic Reinstatement Clause: (a) Applying to Losses Not Exceeding Five Hundred Dollars (\$500.00) Under This Policy: The amount of insurance hereunder involved in a loss payment of Not More Than Five Hundred Dollars (\$500.00) for This Policy shall be automatically reinstated.

(b) Applying to Losses in Excess of Five Hundred Dollars (\$500.00) Under This Policy: In the event of any loss payment under this policy in excess of Five Hundred Dollars (\$500.00) the amount paid shall be deemed reinstated and this policy automatically reinstated to the full amount in force immediately preceding said loss. Provided That the

Policy Shall Be Endorsed to That Effect Within 30 Days After the Payment of Loss, and the Insured Shall Pay to the Company the Pro Rata Premium for the Unexpired Time From the Date of Said Loss to the Expiration of This Policy, at the Rate in Force at the Time of Said Reinstatement.

This clause shall apply to each loss separately.

21. Vacancy—Unoccupancy Clause: Permission is granted to remain vacant or unoccupied without limit of time, Except as Follows: (1) If the subject of insurance (whether building or contents or both) is a manufacturing or mining plant or a mill, permission is granted to remain vacant or unoccupied for not to exceed sixty (60) consecutive days; (2) If the subject of insurance (whether building or contents or both) is a cannery, fruit, nut or vegetable packing or processing plant, fish reduction plant, hop kiln, rice drier, beet sugar factory, cotton gin, cotton compress or cotton seed oil mill, permission is granted (a) to remain vacant for not to exceed sixty (60) consecutive days, and (b) to remain unoccupied But Not Vacant for not to exceed ten (10) consecutive months. Nothing herein contained shall be construed to abrogate or modify any provision or warranty of this policy requiring (1) the maintenance of watchman service; (2) the maintenance of all fire extinguishing appliances and apparatus including sprinkler system, and water supply therefor, and fire detecting systems, in complete working order; nor to extend the term of this policy.

22. Debris Removal Clause: Except as Herein Provided, this policy is extended to cover expenses incurred in the removal of all debris of the property covered hereunder which may be occasioned by loss caused by any of the perils insured against in this policy, Subject to the Following Limits of Liability:

Limits of Liability: This Company Shall Not Be Liable Under This Policy and This Clause for: (a) More Than the Actual Cash Value of the Building or Structure or Contents Thereof, as Covered Hereunder, Which Is Damaged or Destroyed; (b) More Than the Amount of Insurance Applying Under This Policy to the Property Damaged or Destroyed After Application of Any Co-insurance Average, Distribution, or Reduced Rate Contribution Clause Contained Herein; (c) Loss Occasioned by the Enforcement of Any State or Municipal Law or Ordinance Which Necessitates the Demolition of Any Portion of the Building Covered Hereunder Which Has Not Suffered Damage by Any of the Perils Insured Against in This Policy Unless Such Liability Is Specifically Assumed Elsewhere in the Policy: Nor (d) Any Greater Proportion of Such Expense Than the Amount of Insurance Hereunder Bears to the Total Amount of All Insurance Whether All Such Insurance Contains This Clause or Not.

This Clause Does Not Increase the Amount or Amounts of Insurance Provided in the Policy to Which It Is Attached.

If this policy is divided into two or more items,

the foregoing shall apply separately to each item to which this clause applies.

Cost of removal of debris shall not be considered in the determination of actual cash value when applying any Co-insurance. Average, Distribution, or Reduced Rate Contribution clause attached to this policy.

23. Permits and Agreements Clause: Permission granted: (a) For such use of the premises as is usual and incidental to the business conducted therein for existing and increased hazards and for change in use or occupancy except as to any specific hazard, use, or occupancy prohibited by the express terms of this policy or by any endorsement thereto; (b) To keep and use all articles and materials, usual and incidental to said business, in such quantities as the exigencies of the business require; (c) For the building(s) to be in course of construction, alteration or repair, all without limit of time but without extending the term of this policy, and to build additions thereto, and this policy, under its respective item(s), shall cover on or in such additions in contact with such building(s); but if any building herein described is protected by automatic sprinklers, this permit shall not be held to include the reconstruction or the enlargement of any building so protected, without the consent of this Company in writing. This permit does not waive or modify any of the terms or conditions of the Automatic Sprinkler Clause (if any) attached to this policy.

This insurance shall not be prejudiced: (1) By any act or neglect of the owner of the building(s) if the Insured is not the owner thereof, or by any act or neglect of any occupant of the building(s) (other than the named Insured), when such act or neglect of the owner or occupant is not within the control of the named Insured; (2) By failure of the named Insured to comply with any warranty or condition contained in any form, rider or endorsement attached to this policy with regard to any portion of the premises over which the named Insured has no control; nor (3) shall any insurance hereunder on building(s) be prejudiced by any error in stating the name, number, street or location of such building(s).

24. Electrical Apparatus Clause: If Electrical Appliances or Devices (Including Wiring) Are Covered Under This Policy, This Company Shall Not Be Liable for Any Electrical Injury or Disturbance to the Said Electrical Appliances or Devices (Including Wiring) Caused by Electrical Currents Artificially Generated Unless Fire Ensues, and if Fire Does Ensur This Company Shall Be Liable Only for Its Proportion of Loss Caused by Such Ensuing Fire.

Concealment, Fraud

This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or

in case of any fraud or false swearing by the insured relating thereto.

Uninsurable and Excepted Property

This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils Not Included

This company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this company be liable for loss by theft.

Other Insurance

Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions Suspending or Restricting Insurance

Unless otherwise provided in writing added hereto this company shall not be liable for loss occurring (a) While the hazard is increased by any means within the control or knowledge of the insured; or (b) While a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or (c) As a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

Other Perils or Subjects

Any other perils to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Added Provisions

The extent of the application of insurance under this policy and of the contribution to be made by this company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy or by statute is subject to change.

Waiver Provisions

No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this company relating to appraisal or to any examination provided for herein.

Cancellation of Policy

This policy shall be cancelled at any time at the request of the insured, in which case this company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Mortgage Interests and Obligations

If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a 10 days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the

mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro Rata Liability

This company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in Case Loss Occurs

The insured shall give written notice to this company of any loss without unnecessary delay, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within 60 days after the loss, unless such time is extended in writing by this company, the insured shall render to this company a proof of loss signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: The time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, pos-

session or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required and obtainable, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal

In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of

a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's Options

It shall be optional with this company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required.

Abandonment

There can be no abandonment to this company of any property.

When Loss Payable

The amount of loss for which this company may be liable shall be payable 60 days after proof of loss, as herein provided, is received by this company and ascertainment of the loss is made either by agreement between the insured and this company expressed in writing or by the filing with this company of an award as herein provided.

Suit

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

Subrogation

This company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this company.

Extended Coverage Endorsement

(Perils of Windstorm, Hail, Explosion, Riot, Riot Attending a Strike, Civil Commotion, Aircraft, Vehicles, Smoke, Except as Hereinafter Provided)

Attached to and forming part of Policy No. 70997 of the National American Insurance Company.

Issued to Morgan A. Stivers, et al.

Agency at Pasadena, California; Dated December 1, 1952.

Rate for Extended Coverage: Various.

Effective Date of this Endorsement: December 1, 1952.

In consideration of \$. . . . (Included) premium, and subject to provisions and stipulations (hereinafter referred to as "provisions") herein and in the policy to which this endorsement is attached,

including riders and endorsements thereon, the coverage of this policy is extended to include direct loss by Windstorm, Hail, explosion, Riot, Riot Attending a Strike, Civil Commotion, Aircraft, Vehicles and Smoke.

This Endorsement Does Not Increase the Amount or Amounts of Insurance Provided in the Policy to Which It Is Attached.

If this policy covers on two or more items, the provisions of this endorsement shall apply to each item separately.

Substitution of Terms: In the application of the provisions of this policy, including riders and endorsements, but not this endorsement, to the perils covered by this Extended Coverage Endorsement, wherever the word "fire" appears there shall be substituted therefor the peril involved or the loss caused thereby, as the case requires.

Apportionment Clause: This Company Shall Not Be Liable for a Greater Proportion of Any Loss From Any Peril or Perils Included in This Endorsement Than (1) the Amount of Insurance Under This Policy Bears to the Whole Amount of Fire Insurance Covering the Property, Whether Collectible or Not, and Whether or Not Such Other Fire Insurance Covers Against the Additional Peril or Perils Insured Hereunder; (2) Nor for a Greater Proportion Than the Amount of Insurance Under This Policy Bears to the Amount of All Insurance, Whether Collectible or Not, Covering in Any Manner Such Loss; Furthermore, if There Be Insurance Other Than Fire Insurance Covering

Any One or More of the Perils Causing Loss Hereunder, Covering, Specifically Any Individual Unit of Property Involved in the Loss Only Such Proportion of the Insurance Under This Policy Shall Apply to Such Unit Specifically Covered, as the Value of Such Unit Shall Bear to the Total Value of All the Property Covered Under This Policy, Whether Such Other Insurance Contains a Similar Clause or Not.

War Risk Exclusion Clause: This Company Shall Not Be Liable for Loss Caused Directly or Indirectly by (a) Hostile or Warlike Action in Time of Peace or War, Including Action in Hindering, Combating or Defending Against an Actual, Impending or Expected Attack, (1) By Any Government or Sovereign Power, De Jure or De Facto, or by Any Authority Maintaining or Using Military, Naval or Air Forces; or (2) By Military, Naval or Air Forces, or (3) By an Agent of Any Such Government, Power, Authority or Forces, It Being Understood That Any Discharge, Explosion or Use of Any Weapon of War Employing Atomic Fission or Radioactive Force Shall Be Conclusively Presumed to Be Such a Hostile or Warlike Action by Such a Government Power, Authority or Forces; (b) the Insurrection, Rebellion, Revolution, Civil War, Usurped Power, or Action Taken by Governmental Authority in Hindering, Combating or Defending Against Such an Occurrence.

Waiver of Policy Provisions: A claim for loss from perils included in this endorsement shall not

be barred because of change of occupancy, nor because of vacancy or unoccupancy.

Provisions Applicable Only to Windstorm and Hail: This Company Shall Not Be Liable for Loss Caused Directly or Indirectly by (a) Frost or Cold Weather or (b) Snowstorm, Tidal Wave, High Water, Overflow or Ice (Other Than Hail), Whether Driven by Wind or Not.

This Company Shall Not Be Liable for Loss to the Interior of the Building or the Property Covered Therein Caused (a) By Rain, Snow, Sand or Dust, Whether Driven by Wind or Not, Unless the Building Covered or Containing the Property Covered Shall First Sustain an Actual Damage to Roof or Walls by the Direct Force of Wind or Hail and They Shall Be Liable for Loss to the Interior of the Building Through Openings in the Roof or Walls Made by Direct Action of Wind or Hail, or (b) By Water From Sprinkler Equipment or Other Piping, Unless Such Equipment or Piping Be Damaged as a Direct Result of Wind or Hail.

This Company Shall Not Be Liable for Loss to the Following Property: (1) Hay, Straw and Fodder, All Only While Unbaled and Located Outside of Building; or (2) Growing Crops Wherever Located.

The Provisions Printed on the Back of This Form Are Hereby Referred to and Made a Part Hereof.

/s/ TRUMAN B. STIVERS,
Agent.

Caution: When This Endorsement Is Attached to One Fire Policy, the Insured Should Secure Like Coverage on All Fire Policies Covering the Same Property.

Provisions Referred to in and Made Part of This Form (No. 202)

Provisions Applicable Only to Explosion: Loss by Explosion Shall Include Direct Loss Resulting From the Explosion of Accumulated Cases or Unconsumed Fuel Within the Firebox (or the Combustion Chamber of Any Fired Vessel or Within the Flues or Passages Which Conduct the Cases of Combustion Therefrom, but This Company Shall Not Be Liable for Loss by Explosion, Rupture or Bursting of Steam Boilers, Steam Pipes, Steam Turbines, Steam Engines or Fly-wheels, Owned, Operated or Controlled by the Insured or Located in the Building(s) Described in This Policy.

Any Other Explosion Clause Made a Part of This Policy Is Superseded by This Endorsement.

Provisions Applicable Only to Riot, Riot Attending a Strike and Civil Commotion: Loss by riot, riot attending a strike or civil commotion shall include direct loss by acts of striking employees of the owner or tenant(s) of the described building(s) while occupied by said striking employees and shall also include direct loss from pillage and looting occurring during and at the immediate place of a riot, riot attending a strike or civil commotion. This Company Shall Not Be Liable, However, for Loss

Resulting From Damage to or Destruction of the Described Property Owing to Change in Temperature or Interruption of Operations Resulting From Riot or Strike or Occupancy by Striking Employees or Civil Commotion, Whether or Not Such Loss, Due to Change in Temperature or Interruption of Operations, Is Covered by This Policy as to Other Perils.

Provisions Applicable Only to Loss by Aircraft and Vehicles: Loss by aircraft includes direct loss by objects falling therefrom. The Term "Vehicles," as Used in This Endorsement, Means Vehicles Running on Land or Tracks but Not Aircraft. This Company Shall Not Be Liable, However, for Loss (a) by Any Vehicle Owned or Operated by the Insured or by Any Tenant of the Described Premises; (b) by Any Vehicle to Fences, Driveways, Walks or Lawns; (c) to Any Aircraft or Vehicle Including Contents Thereof Other Than Stocks of Aircraft or Vehicles in Process of Manufacture or for Sale.

Provisions Applicable Only to Smoke: The Term "Smoke," as Used in This Endorsement, Means Only Smoke Due to a Sudden, Unusual and Faulty Operation of Any Heating or Cooking Unit, Only When Such Unit Is Connected to a Chimney by a Pipe or Vent, and While in or on the Premises Described in This Policy, Excluding, However, Smoke From Fireplaces or Industrial Apparatus.

Provisions Applicable Only When This Endorse-

ment Is Attached to a Policy Covering Business Interruption (Use and Occupancy), Extra Expense, Additional Living Expense, Rents, Leasehold Interest, Profits and Commissions, or Consequential Loss; When This Endorsement Is Attached to a Policy Covering Business Interruption (Use and Occupancy), Extra Expense, Additional Living Expense, Rents, Leasehold Interest, Profits and Commissions, or Consequential Loss, the Term "Direct," as Applied to Loss, Means Loss, as Limited and Conditioned in Such Policy, Resulting From Direct Loss to Described Property From Perils Insured Against; and, While the Business of the Owner or Tenant(s) of the Described Building(s) Is Interrupted by a strike at the Described Location, This Company Shall Not Be Liable for Any Loss Owing to Interference by Any Person(s) With Rebuilding, Repairing or Replacing the Property Damage or Destroyed or With the Resumption or Continuation of Business.

[Endorsed]: Filed September 9, 1955.

In the District Court of the United States
for the Southern District of California

No. 18737-Y

MORGAN A. STIVERS,

Plaintiff,

vs.

NATIONAL AMERICAN INSURANCE COM-
PANY, a Corporation, et al.,

Defendants.

ANSWER OF DEFENDANTS GIRARD IN-
SURANCE COMPANY OF PHILADEL-
PHIA, PENNSYLVANIA

Defendant Girard Insurance Company of Phila-
delphia, Pennsylvania, answers the complaint of
plaintiff as follows:

First Defense

Answers the Third Alleged Cause of Action
Therein Contained as Follows:

1. Said defendant answers Paragraph I thereof,
as follows:

Said defendant alleges that it is without knowl-
edge or information sufficient to form a belief as to
the truth of the allegations contained in Paragraph
I, III and IV of said first alleged cause of action
in said complaint.

Said defendant admits that on said day a fire
occurred at the said premises and damaged certain
buildings and contents.

Said defendant admits that said packing house and platform was of a cash value in the amount of \$18,000.00, said equipment was of a cash value in the amount of \$12,500.00, said field boxes and supplies were of a cash value in the amount of \$5,000.00 and said storage building was of the cash value in the amount of \$2,500.00. [34]

Said defendant denies each and every allegation contained in Paragraph I of said Third Cause of Action not so expressly admitted or denied.

2. Said defendant answers Paragraph III thereof, as follows:

On said day it executed a California Standard Form fire insurance policy No. 2702 and attached thereto extended coverage endorsement, loss payable endorsement and building, equipment and 2 stock form No. 78, wherein the named insured was Morgan A. Stivers and Raymond K. Stivers, dba Stivers Packing Company, in said respective amounts.

Said defendant denies each and every allegation therein contained not so expressly admitted.

3. Said defendant answers Paragraph IV thereof, as follows:

It admits said policy replaced former policy No. 102, and said defendant denies each and every allegation therein contained not so expressly admitted.

4. Said defendant answers Paragraph V thereof, as follows:

Said defendant admits that said Lender's Loss Payable endorsement was attached to said policy.

Said defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said Paragraph V.

5. Said defendant answers Paragraph VI thereof, as follows:

Said defendant admits that prior to the expiration of said 60 day period it extended the time to file said Proof of Loss, and that said plaintiff filed said Proof of Loss within said extended period, and said defendant denies each and every allegation therein contained not so expressly admitted.

6. Said defendant answers Paragraph VII thereof, as follows:

It alleges that:

(a) Lines 28 to 34 of said policy provides, in part, as follows:

“Conditions suspending or restricting insurance, unless otherwise provided in writing, added hereto this company shall not be liable for loss occurring * * *; [35] or (b) While a described building, whether intended for occupancy by owner or tenant, is vacant or occupied beyond a period of 60 days; * * *”

(b) Paragraph 21 of said Building, Equipment and Stock form provides, in part, as follows:

“Vacancy—Unoccupancy Clause: Permission is granted to remain vacant or unoccupied without limit of time, Except As Follows: * * *; (2) If the subject of insurance (whether building or contents or both) is a cannery, fruit, nut or vegetable packing or processing plant * * *,

permission is granted (a) to remain vacant not to exceed sixty (60) consecutive days, and (b) to remain unoccupied but not Vacant for not to exceed ten (10) consecutive months.”

Said defendant is informed and believes and upon such information and belief alleges that said premises was unoccupied from July, 1952, to and including October 13, 1954.

(c) Lines 149 to 152 of said policy provide, in part, as follows:

“Suit: No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all of the requirements of this policy shall have been complied with” * * *

Said defendant denies each and every allegation therein contained not so expressly admitted.

7. Said defendant answers Paragraph VIII thereof, as follows:

Said defendant admits that Lines 25 to 27 of said policy referred to “Other Insurance” and that there was insurance on said packing house and platform in the said sum of \$18,000.00, on said equipment in said sum of \$12,500.00, on said field supplies and boxes in said sum of \$5,000.00 on said storage building in the sum of \$2,500.00 and on said bunk house in the sum of \$2,000.00.

Said defendant denies each and every allegation therein contained not so expressly admitted.

8. Said defendant answers Paragraph IX thereof, as follows:

Said defendant admits that it has not paid any part of said loss and said defendant denies each and every allegation therein contained not so expressly admitted. [36]

Answers the Fourth Alleged Cause of Action Therein Contained as Follows:

1. Said defendant answers Paragraph I thereof, as follows:

Said defendant re-alleges, re-affirms and re-adopts as a part hereof all of the allegations contained in Paragraph I of the foregoing answer to the Third Alleged Cause of Action, the same as if specifically set forth herein.

2. Said defendant answers Paragraph II thereof, as follows:

Said defendant re-alleges, re-affirms and re-adopts as a part thereof all of the allegations contained in Paragraphs II to VIII of the foregoing answer to the Third Alleged Cause of Action the same as if set forth herein.

3. Said defendant denies each and every allegation contained in Paragraph III thereof, and alleges that lines 46 to 51 of said policy read as follows:

“Waiver Provisions. No Permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provisions, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on

the part of this company relating to appraisal or to any examination provided for herein.”

Second Defense

Said complaint and said third and fourth alleged causes of action therein contained fail to state a claim against this defendant upon which relief can be granted.

Third Defense

Said defendant alleges that it is informed and believes and upon such information and belief alleges that Raymond K. Stivers, Howard Stivers and said Farmers and Merchants Bank of Long Beach, each, is a real party in interest herein.

Wherefore, said defendant prays that said plaintiff take [37] nothing and said defendant recover its costs of suit herein and for such other and further relief as is just and proper in the premises.

/s/ AUGUSTUS CASTRO,
Attorney for Defendant Girard Insurance Company
of Philadelphia, Pennsylvania.

[Endorsed]: Filed September 15, 1955. [38]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT QUEEN INSURANCE COMPANY OF AMERICA

Defendant Queen Insurance Company of America answers the complaint of plaintiff as follows:

First Defense

Answers the Seventh Alleged Cause of Action Therein Contained as Follows:

1. Said defendant answers Paragraph I thereof, as follows:

Said defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph I and IV of the first alleged cause of action.

Said defendant admits that on said day a fire occurred at said premises and damaged certain buildings and contents.

Said defendant admits that packing house and platform was of a cash value in the amount of \$18,000.00, said equipment was of a cash value in the amount of \$12,500.00, said field boxes and supplies were of a cash value in the amount of \$5,000.00 and said storage building was of the cash value in the amount of \$2,500.00. [39]

Said defendant denies each and every allegation contained in Paragraph I of said Seventh Cause of Action not so expressly admitted or denied.

2. Said defendant answers Paragraph III thereof, as follows:

Said defendant admits that prior to said fire Roy A. McMillan was licensed by the State of California as an insurance agent and authorized, by and on behalf of said defendant company to transact insurance; and defendant admits that after said fire it authorized said "General Adjustment Bureau, Inc., a corporation" to determine the actual cash value of the real and personal property involved in said fire and the amount of loss thereto.

Said defendant denies each and every allegation therein contained not so expressly admitted.

3. Said defendant answers Paragraph IV thereof, as follows:

On said day it executed a California Standard Form fire insurance policy No. 764197 and attached thereto extended coverage endorsement, loss payable endorsement, and building, equipment and stock form No. 78 and insured said buildings, equipment and supplies and boxes in said respective amounts.

Said defendant denies each and every allegation therein contained not so expressly admitted.

4. Said defendant answers Paragraph V thereof, as follows:

Said defendant admits that said Lender's Loss Payable endorsement was attached to said policy. Said defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said Paragraph V.

5. Said defendant answers Paragraph VI thereof, as follows:

Said defendant admits that prior to the expiration of said 60 day period it extended the time to file said Proof of Loss, and that said plaintiff filed said Proof of Loss within said extended period, and said defendant denies each and every allegation therein contained not so expressly admitted. [40]

6. Said defendant answers Paragraph VII thereof, as follows:

It alleges that:

(a) Lines 28 to 34 of said policy provides, in part, as follows:

“Conditions suspending or restricting insurance. Unless otherwise provided in writing added thereto this company shall not be liable for loss occurring * * *; or (b) While a described building, whether intended for occupancy by owner or tenant, is vacant or occupied beyond a period of 60 days; * * *”

(b) Paragraph 21 of said Building, Equipment and Stock form provides, in part, as follows:

“Vacancy—Unoccupancy Clause: Permission is granted to remain vacant or unoccupied without limit of time, Except As Follows: * * *; (2) If the subject of insurance (whether building or contents or both) is a cannery, fruit, nut or vegetable packing or processing plant * * *, permission is granted (a) to remain vacant not to exceed sixty (60) consecutive days, and (b) to remain unoccupied but not Vacant for not to exceed ten (10) consecutive months.”

Said defendant is informed and believes and upon such information and belief alleges that said premises was unoccupied from July, 1952, to and including October 13, 1954.

(c) Lines 149 to 152 of said policy provide, in part, as follows:

“Suit: No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all of the requirements of this policy shall have been complied with” * * *

Said defendant denies each and every allegation therein contained not so expressly admitted.

7. Said defendant answers Paragraph VIII thereof, as follows:

Said defendant admits that Lines 25 to 27 of said policy referred to “Other Insurance” and that there was insurance on said packing house and platform in the said sum of \$18,000.00, on said equipment in said sum of \$12,500.00, on said field supplies and boxes in said sum of \$5,000.00 on said storage building in the sum of \$2,500.00 and on said bunk house in the sum of \$2,000.00. [41]

Said defendant denies each and every allegation therein contained not so expressly admitted.

8. Said defendant answers Paragraph IX thereof, as follows:

Said defendant admits that it has not paid any part of said loss and said defendant denies each and every allegation therein contained not so expressly admitted.

Answers the Eighth Alleged Cause of Action Therein Contained as Follows:

1. Said defendant answers Paragraph I thereof, as follows:

Said defendant re-alleges, re-affirms and re-adopts as a part hereof all of the allegations contained in Paragraph I of the foregoing answer to the Seventh Alleged Cause of Action the same as if specifically set forth herein.

2. Said defendant answers Paragraph II thereof, as follows:

Said defendant re-alleges, re-adopts and re-affirms as a part hereof all of the allegations contained in Paragraphs 2 to 8 of the foregoing answer to the Seventh Alleged Cause of Action the same as if specifically set forth herein.

3. Said defendant denies each and every allegation contained in Paragraph III thereof.

Second Defense

Said complaint and said seventh and eighth causes of action therein contained fail to state a claim against this defendant upon which relief can be granted.

Third Defense

Said defendant alleges that it is informed and believes and upon such information and belief alleges that Raymond K. Stivers, Howard Stivers and said Farmers and Merchants Bank of Long Beach, each, is a real party in interest herein. [42]

Wherefore, said defendant prays that said plaintiff take nothing and said defendant recover its costs of suit herein and for such other and further relief as is just and proper in the premises.

/s/ AUGUSTUS CASTRO,
Attorney for Defendant Queen Insurance Company
of America.

[Endorsed]: Filed September 15, 1955. [43]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT INSURANCE
COMPANY OF THE STATE OF PENN-
SYLVANIA

Defendant Insurance Company of the State of Pennsylvania, answers the complaint of plaintiff as follows:

First Defense

Answers the Fifth Alleged Cause of Action
Therein Contained as Follows:

1. Said defendant answers Paragraph I thereof,
as follows:

Said defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph I and IV of the first alleged cause of action.

Said defendant admits that on said day a fire occurred at the said premises and damaged certain buildings and contents.

Said defendant admits that said packing house and platform was of the cash value in the amount of \$18,000.00, said equipment was of a cash value in the amount of \$12,500.00, said field boxes and supplies were of a cash value in the amount of \$5,000.00 and said storage building was of the cash value in the amount of \$2,500.00. [44]

Said defendant denies each and every allegation contained in Paragraph I of said Fifth Cause of Action not so expressly admitted or denied.

2. Said defendant answers Paragraph III thereof, as follows:

Said defendant admits that prior to said fire Roy A. McMillin was licensed by the State of California as an insurance agent and authorized, by and on behalf of said defendant company to transact insurance; and after said fire, said defendant admits that it authorized said "General Adjustment Bureau, Inc., a corporation" to determine the actual cash value of the real and personal property involved in said fire and the amount of loss thereto.

Said defendant denies each and every allegation therein contained not so expressly admitted.

3. Said defendant answers Paragraph IV thereof, as follows:

On said day it executed a California Standard Form fire insurance policy No. 101260 and attached thereto extended coverage endorsement, loss payable endorsement and building, equipment and stock form No. 78 and insured said buildings, equipment and supplies and boxes in said respective amounts.

Said defendant denies each and every allegation therein contained not so expressly admitted.

4. Said defendant answers Paragraph V thereof, as follows:

Said defendant admits that said Lender's Loss Payable endorsement was attached to said policy. Said defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said Paragraph V.

5. Said defendant answers Paragraph VI thereof, as follows:

Said defendant admits that prior to the expiration of said 60 day period it extended the time to file said Proof of Loss, and that said plaintiff filed said Proof of Loss within said extended period, and said defendant denies each and every allegation therein contained not so expressly admitted.

6. Said defendant answers Paragraph VII thereof, as follows: [45]

It alleges that:

(a) Lines 28 to 34 of said policy provides, in part, as follows:

“Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this company shall not be liable for loss occurring * * *, or (b) While a described building, whether intended for occupancy by owner or tenant, is vacant or occupied beyond a period of 60 days; * * *”

(b) Paragraph 21 of said Building, Equipment and Stock form provides, in part, as follows:

“Vacancy—Unoccupancy Clause: Permission is granted to remain vacant or unoccupied without limit of time, Except As Follows: * * *; (2) If the subject of insurance (whether building or contents or both) is a cannery, fruit, nut or vegetable packing or processing plant * * *, permission is granted (a) to remain vacant not to exceed sixty (60) consecutive days, and (b) to remain unoccupied but not Vacant for not to exceed ten (10) consecutive months.”

Said defendant is informed and believes and upon such information and belief alleges that said premises was unoccupied from July, 1952, to and including October 13, 1954.

(c) Lines 149 to 152 of said policy provide, in part, as follows:

“Suit: No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all of the requirements of this policy shall have been complied with” * * *

Said defendant denies each and every allegation therein contained not so expressly admitted.

7. Said defendant answers Paragraph VIII thereof, as follows:

Said defendant admits that Lines 25 to 27 of said policy referred to “Other Insurance” and that there was insurance on said packing house and platform in the said sum of \$18,000.00, on said equip-

ment in said sum of \$12,500.00, on said field supplies and boxes in said sum of \$5,000.00 on said storage building in the sum of \$2,500.00 and on said bunk house in the sum of \$2,000.00.

Said defendant denies each and every allegation therein contained not so expressly admitted. [46]

8. Said defendant answers Paragraph IX thereof, as follows:

Said defendant admits that it has not paid said loss or any part thereof and denies each and every allegation therein contained not so expressly admitted.

Answers the Sixth Alleged Cause of Action Therein Contained as Follows:

1. Said defendant answers Paragraph I thereof, as follows:

Said defendant re-alleges, re-adopts and re-affirms as a part hereof all of the allegations contained in Paragraph I of the foregoing answer to the Fifth Alleged Cause of Action the same as if specifically set forth herein.

2. Said defendant answers Paragraph II thereof, as follows:

Said defendant re-alleges, re-adopts and re-affirms as a part hereof all of the allegations contained in Paragraphs 2 to 8 of the foregoing answer to the Fifth Alleged Cause of Action the same as if specifically set forth herein.

3. Said defendant denies each and every allegation contained in Paragraph III thereof.

Second Defense

Said complaint and said fifth and sixth alleged causes of action therein contained fail to state a claim against this defendant upon which relief can be granted.

Third Defense

Said defendant alleges that it is informed and believes and upon such information and belief alleges that Raymond K. Stivers, Howard Stivers and said Farmers and Merchants Bank of Long Beach, each, is a real party in interest herein.

Wherefore, said defendant prays that said plaintiff take [47] nothing and said defendant recover its costs of suit herein and for such other and further relief as is just and proper in the premises.

/s/ AUGUSTUS CASTRO,

Attorney for Defendant Insurance Company of the State of Pennsylvania.

[Endorsed]: Filed September 15, 1955. [48]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT NATIONAL
AMERICAN INSURANCE COMPANY

Defendant National American Insurance Company answers the complaint of plaintiff as follows:

First Defense

Answers the First Alleged Cause of Action Therein Contained as Follows:

1. Said defendant answers Paragraphs I and IV thereof, as follows:

Said defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs I and IV thereof.

2. Said defendant answers Paragraph III thereof, as follows:

Said defendant admits that prior to said fire Truman B. Stivers was licensed by the State of California as an insurance agent and authorized, by and on behalf of said defendant company to transact insurance; and after said fire, said defendant admits that it authorized said General Adjustment Bureau, Inc., a corporation, to determine the actual cash value of the real and personal property involved in said fire and the amount of loss there-to. [49]

Said defendant denies each and every allegation therein contained not so expressly admitted.

3. Said defendant answers Paragraph V thereof, as follows:

Said defendant admits that on said day it executed a California Standard Form Fire Insurance policy Number 70997, and attached thereto extended coverage endorsement SFBF202, Building, Equipment and Stock form Number 78 wherein the named insured was Morgan A. Stivers, dba Stivers Packing Co. in said respective amounts.

Said defendant denies each and every allegation therein contained not so expressly admitted.

4. Said defendant answers Paragraph VI thereof, as follows:

Said defendant admits that on said day a fire occurred at said premises and damaged certain buildings and contents and said defendant denies each and every allegation therein contained not so expressly admitted.

5. Said defendant answers Paragraph VII thereof, as follows:

Said defendant admits that said packing house and platform had an actual cash value of \$18,000.00, said equipment had an actual cash value of \$12,500.00, said field boxes and supplies had an actual cash value of the amount of \$5,000.00, said storage buildings had an actual cash value in the aggregate of \$2,500.00 and said defendant denies each and every allegation therein contained not so expressly admitted, and in this connection denies that there was a loss in the sum of \$166,642.00, or any part thereof, or any sum at all, and denies that there was a loss in connection with said packing house and platform in the amount of \$65,000.00, or any part thereof, or any sum at all, and denies there was a loss in connection with said equipment in the amount of \$67,242.00, or any part thereof, or any sum at all, and denies that there was a loss in connection with stock including field supplies and boxes in the amount of \$25,150.00, or any part thereof, or any sum at all, and denies that there was a loss in connection with storage buildings in the amount of \$9,250.00, or any [50] part thereof, or at all.

6. Said defendant answers Paragraph VIII thereof, as follows:

Said defendant admits that prior to the expiration of said 60 day period it extended the time to file said Proof of Loss and that said plaintiff filed said Proof of Loss within said extended period and said defendant denies each and every allegation therein contained not so expressly admitted.

7. Said defendant answers Paragraph IX thereof, as follows:

Said defendant alleges that:

(a) Lines 28 to 34 of said policy provides, in part, as follows:

“Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this company shall not be liable for loss occurring * * * or (b) While a described building, whether intended for occupancy by owner or tenant, is vacant or occupied beyond a period of 60 days * * *”;

(b) Paragraph 21 of said Building, Equipment and Stock form provides, in part, as follows:

“Vacancy—Unoccupancy Clause: Permission is granted to remain vacant or unoccupied without limit of time, Except as Follows: * * * (2) If the subject of insurance (whether building or contents or both) is a cannery, fruit, nut or vegetable packing or processing plant * * * permission is granted (a) to remain vacant not to exceed sixty (60) consecutive days, and (b) to remain unoccupied but not Vacant for not to exceed ten (10) consecutive months.”

Said defendant is informed and believes and upon such information and belief alleges that said premises was unoccupied from July, 1952, to and including October 13, 1954.

(c) Lines 149 to 152 of said policy provide, in part, as follows:

“Suit: No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all of the requirements of this policy shall have been complied with” * * *

Said defendant denies each and every allegation therein contained not so expressly admitted. [51]

8. Said defendant answers Paragraph X thereof, as follows:

Said defendant admits that Lines 25 to 27 of said policy referred to “Other Insurance” and that there was insurance on said packing house and platform in the said sum of \$18,000.00, on said equipment in said sum of \$12,500.00, on said field supplies and boxes in said sum of \$5,000.00 on said storage building in the sum of \$2,500.00 and on said bunk house in the sum of \$2,000.00.

Said defendant denies each and every allegation therein contained not so expressly admitted and in this connection denies that said defendant has any liability to said plaintiff in the amount of \$8,000.00, or any part thereof, or in any amount, or at all.

9. Said defendant answers Paragraph XI thereof, as follows:

Said defendant admits that it has not paid any part of any loss and said defendant denies each and every allegation therein contained not so expressly admitted.

Answers the Second Alleged Cause of Action Therein Contained as Follows:

1. Said defendant answers Paragraph I thereof, follows:

Said defendant re-alleges, re-affirms and re-adopts as a part hereof all of the allegations contained in Paragraphs 1 to 9, inclusive, of the foregoing answer to the first alleged cause of action, the same as if specifically set forth herein.

2. Said defendant denies each and every allegation contained in Paragraph II thereof, and alleges that lines 46 to 51 of said policy read as follows:

“Waiver Provisions. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provisions, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this company relating to appraisal or to any examination provided for [52] herein.”

Second Defense

Said complaint and said first and second alleged causes of action therein contained fail to state a claim against this defendant upon which relief can be granted.

Third Defense

Said defendant alleges that it is informed and believes and upon such information and belief alleges that Raymond K. Stivers, Howard Stivers and said Farmers and Merchants Bank of Long Beach, each, is a real party in interest herein.

Wherefore, said defendant prays that said plaintiff take nothing and said defendant recover its costs of suit herein and for such other and further relief as is just and proper in the premises.

/s/ AUGUSTUS CASTRO,

Attorney for Defendant National American Insurance Company.

Affidavit of service by mail attached.

[Endorsed]: Filed October 7, 1955. [53]

[Title of District Court and Cause.]

STIPULATION TO AMENDMENT OF PLAINTIFF'S COMPLAINT AND DEFENDANTS' ANSWER THERETO

It Is Hereby Stipulated by and between counsel for the Plaintiff and Defendant, Girard Insurance Company of Philadelphia, Pennsylvania, that the Third and Fourth causes of action of Plaintiff's complaint may be amended by adding thereto the following allegation:

"That at all times herein mentioned, Truman B. Stivers and the General Adjustment Bureau, Inc.,

a Corporation, were the duly authorized agents, servants and employees of the Defendant, Girard Insurance Company of Philadelphia, Pennsylvania.”

It Is Further Stipulated by and between the aforesaid counsel that the aforesaid allegation may be deemed denied by [55] said Defendant, Girard Insurance Company of Philadelphia, Pennsylvania.

Dated this 3rd day of January, 1956.

/s/ HARWOOD STUMP,
Attorney for Plaintiff.

/s/ AUGUSTUS CASTRO,
Attorney for Defendants.

It is so ordered.

Date: Jan. 18, 1956.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed January 19, 1956. [56]

[Title of District Court and Cause.]

PLAINTIFF'S TRIAL MEMORANDA IN
COMPLIANCE WITH RULE 12

* * *

Admissions and Stipulations

The following facts are admitted by the pleadings:

A. Policies and Coverage—Each Defendant ad-

mits that it issued to the Plaintiff a policy of insurance in the amounts and at the time alleged in the complaint.

B. Fire—Each Defendant admits that fire occurred at said premises on October 13, 1954, and that certain buildings and contents were damaged thereby.

C. Value at time of Loss—Each Defendant admits the cash value of the insured property at time of loss is as follows:

Packing house and platform.....	\$18,000.00
Equipment	12,500.00
Field boxes and supplies.....	5,000.00
Storage building	2,500.00

D. Proof of Loss—Each Defendant admits extending the time for Plaintiff to file Proof of Loss and that Plaintiff filed said Proof of Loss within said extended period.

E. Agency—Each Defendant, except Girard Insurance Company of Philadelphia, admits that it authorized the General Adjustment Bureau, Inc., a Corporation, to determine the actual cash value of the real and personal property involved in said fire and the amount of loss thereto.

Defendant National American Insurance Company admits that prior to said fire Truman B. Stivers was authorized by it to transact insurance for and on its behalf.

Defendants Queen Insurance Company of America and Insurance Company of the State of Penn-

slyvania admit that prior [59] to said fire they authorized Roy A. McMillan to transact insurance for and on their behalf.

F. Other Insurance—Each Defendant admits other insurance was permitted under the terms of its policy and admits that there was insurance on premises and the contents thereof, as alleged in the complaint.

G. Payment—Each Defendant admits that it has paid nothing to the Plaintiff for and on account of any loss occurring by reason of said fire. [60]

* * *

Respectfully submitted,

/s/ HARWOOD STUMP,
Attorney for Plaintiff.

Affidavit of service by mail attached .

[Endorsed]: Filed February 13, 1956. [63]

[Title of District Court and Cause.]

DEFENDANTS' REPLY TRIAL MEMORANDA

* * *

III.

In addition, to the admissions set forth at page 3, Paragraphs A, B, C, D, F and G of plaintiffs' brief,
Admissions and Stipulations

defendants admit the loss and damage was as follows:

Packing house	\$18,000.00
Equipment	12,500.00
Field boxes and supplies.....	5,000.00
Storage building	2,500.00

In reply to Paragraph E page 3 plaintiff's brief entitled "Agency," Truman B. Stivers, was a local agent authorized to solicit insurance for defendant Girard at Pasadena, California, and Roy A. McMillan was a local agent authorized to solicit insurance for defendants Queen and State of Altadena, California. [71]

* * *

/s/ AUGUSTUS CASTRO,

Attorney for Defendants.

Affidavit of service by mail attached.

[Endorsed]: Filed February 17, 1956. [79]

[Title of District Court and Cause.]

MEMORANDUM OPINION

This action brought by Morgan A. Stivers is to recover against four insurance companies, National American Insurance Company, Girard Insurance Company of Philadelphia, The Insurance Company of the State of Pennsylvania, and Queen Insurance Company of America [hereinafter each to be respectively known as National, Girard, State, and

Queen] on four different policies of insurance covering property owned by the plaintiff.

The property involved was located at Sides Station, 3 miles north of Lindsay, Tulare County, California, and consisted primarily of a citrus fruit packing house and loading platform, field supplies and boxes, a bunk house and a storage building. The policies were effective December 1, 1952, and a fire destroyed the property on October 13, 1954. [81]

Two of the policies were obtained through Truman B. Stivers, a nephew of the plaintiff, who was licensed as an insurance agent in Pasadena, California, and who represented the defendants National and Girard. Truman Stivers was not an agent of either Queen or State, and the policies of insurance issued from those companies were obtained from their duly authorized agent, Roy A. MacMillan. All policies were written on the standard California form.

The issue presented for determination is whether the insurance policies were suspended at the time of the fire because of non-compliance with one of the terms of each particular policy, i.e. because of non-occupancy of the premises as a fruit-packing plant for a period of more than ten consecutive months prior to the fire.

The pertinent provisions of each policy of fire insurance provide as follows:

Lines 28-34 of each policy:

Conditions Suspending or Restricting Insurance:

Unless otherwise provided in writing added hereto this company shall not be liable for a loss occurring * * * (b) While a described building, whether intended for occupancy for owner or tenant, is vacant beyond a period of sixty consecutive days * * *

Paragraph 21 of Building, Equipment and Stock Endorsement No. 78 extends the period of unoccupancy as follows:

Vacancy—Unoccupancy Clause:

Permission is granted to remain vacant or unoccupied without limit of time, Except As Follows * * *

(2) If the subject of insurance (whether building or contents or both) is a cannery, fruit, nut or vegetable packing or processing plant * * * permission is granted (a) to remain vacant for not to exceed sixty (60) consecutive days, and (b) to remain unoccupied But Not Vacant for not to exceed ten (10) consecutive months.

It is admitted that the citrus fruit packing house was not operated for a period of time greater than ten (10) consecutive months prior to the fire on October 10, 1954. [82] If the fire had occurred within ten months of the issuance of the policies a different question might arise.

One of the contentions made by the plaintiff is that liability was not suspended because the premises were not insured as a fruit packing plant. Plaintiff refers to the fact that in none of the poli-

cies of insurance is there a complete description of the packing plant; it is not described with specificity as a fruit packing plant. Both the insurer and the insured knew that it was not operating thus making the occupancy clause inoperative.

There is no dispute that the property including machinery and equipment was geared for operation as a citrus fruit packing plant. It had in fact in the past been used as such. The contention made by the plaintiff that the description of the premises on the individual insurance policies is controlling is without merit in that the subject of insurance was as a matter of fact a fruit packing plant and under such circumstances it is proper to look at the subject of insurance rather than the title on the respective insurance policies. The status of the insurance is not changed by a description on the policy.

A contract should be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of contracting [Cal. Civ. Code §1636] and a fire insurance policy should be construed in like manner to cover the subject matter intended. Appleman, Insurance Law & Practice, Vol. 4, p. 174. A "packing house" is used to pack "something," in this case citrus fruit and a common-sense interpretation of the contract results in it being a policy to insure a fruit packing plant. [See Cal. Civ. Code §1644].

The other contentions of the plaintiff have greater merit. He urges that the premises were occupied as contemplated [83] by the parties and the defend-

ants have waived their right to assert, or should be estopped from asserting the occupancy provision.

The factual basis for this argument is that Truman Stivers knew that the citrus plant was not operating and informed the plaintiff "that unless he would keep somebody on the property his insurance would be in jeopardy * * * and he should try and keep somebody in there living on the premises." [Reporter's Transcript p. 99] Relying on this statement and to keep the insurance effective the plaintiff obtained a family, Mr. and Mrs. Morris and their son, to live in a trailer alongside the plant. This was not living on the insured premises. (See *Rossini vs. St. Paul Fire & Marine Insurance Co.*, 188 P. 564; also *Words & Phrases*, Permanent Edition, Vol. 33, p. 353).

Assuming without deciding that the agent, Truman Stivers, had authority, either actual or ostensible, as to two of the policies to permit this substitution of conditions without having a written endorsement attached to the policy, this court finds that the substituted condition was not complied with. From the testimony at the time of trial there is no doubt that the requirement of having someone living on the premises was not fulfilled, The trailer was at least 50 feet from the plant and neither Mr. nor Mrs. Morris had a key to any of the buildings. In addition, Mrs. Morris testified that on the day of the fire no one was present on the premises because they were all at work, which was their customary practice.

This is not the type of case where a party relied on an agent's statements waiving a condition of an insurance policy. The plaintiff was apprised of the fact that his insurance would "be in jeopardy" unless a stated condition was complied with, and from all the facts there is no doubt that the [84] requirement was not met. The premises were not occupied as contemplated by the parties.

This determination is dispositive of the case. It is not necessary to determine whether or not Truman Stivers was a general agent, which I seriously doubt, and whether he had sufficient authority to waive the occupancy clause.

Judgment is for the defendants, and counsel for the defendants is ordered to submit proposed findings and conclusions of law in accordance with Local Rule 7.

Dated: This 25th day of April, 1956.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed April 25, 1956. [85]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 21st day of February, 1956, the above-entitled action came on regularly for trial, before the above-entitled Court, Judge Ben Harrison, pre-

siding, and sitting without a jury, and was heard by Judge Ben Harrison on February 21 and 22, 1956, Harwood Stump, Esq., appeared as attorney for plaintiff Morgan A. Stivers, and Augustus Castro, Esq., appeared as attorney for Defendants National American Insurance Co., a corporation (hereinafter referred to as "National"), Girard Insurance Company of Philadelphia, Pennsylvania, a corporation (hereinafter referred to as "Girard"), the Insurance Company of the State of Pennsylvania, a corporation (hereinafter referred to as "State"), and Queen Insurance Company of America, a corporation (hereinafter referred to as "Queen"). Oral and documentary evidence was introduced, and the matter having been fully argued by the respective parties and submitted for decision, and the Court being fully advised in the premises, and having written and filed herein its written [86] Memorandum Opinion, dated April 25, 1956, after full consideration and due deliberation, finds the facts of said cause to be as follows:

Findings of Fact

I.

It is true that at all times hereinafter mentioned:

(a) Plaintiff was a citizen of the State of California;

(b) Each of the defendants, National, Girard, State and Queen, was a corporation duly organized and existing under the laws of a state other than California, and each of said defendants National, Girard, State and Queen was duly authorized under

the laws of the State of California to transact an insurance business in the State of California;

(c) The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

It is true that at all times hereinafter mentioned:

(a) General Adjustment Bureau, Inc., a corporation, was authorized by each of said defendants to determine the actual cash value of the buildings and personal property involved in that certain fire hereinafter mentioned and the amount of loss to such property;

(b) Roy A. McMillin was licensed by the State of California as an insurance agent and authorized as an agent by and on behalf of defendants Queen and State in Altadena, California; and Truman B. Stivers was not an agent of defendant Queen or State.

(c) Truman B. Stivers was licensed by the State of California as an insurance agent and was an agent of defendants National and Girard in Pasadena, California;

(d) Truman B. Stivers was a nephew of plaintiff, and authorized as an agent by and on behalf of plaintiff to handle the insurance hereinafter mentioned of plaintiff.

III.

It is true that at all times hereinafter mentioned plaintiff [87] was the owner in fee of the hereinafter mentioned citrus fruit packing house and loading platform, bunk house and storage building,

the machinery, equipment, field supplies and boxes, all situated at Sides Station, 3 miles north of Lindsay, Tulare County, California.

IV.

It is true that at the request of plaintiff, through his agent Truman B. Stivers, on or about the 18th day of November, 1952, at Pasadena, California, in consideration of a premium, National issued to plaintiff a standard California form of fire insurance policy No. 70997, and attached thereto extended coverage endorsement SFBF 202, building, equipment and stock form No. 78, wherein the named insured was Morgan A. Stivers, dba Stivers Packing Company, whereby National insured plaintiff against loss or damage by fire in the amount of \$10,000 as follows:

\$5,000 for said packing house and loading platform;

\$1,500 for said stock consisting principally of field supplies and boxes;

\$2,000 for said bunk house; and

\$1,500 for said storage building.

V.

It is true that at the request of plaintiff, through his agent Truman B. Stivers, on or about the 1st day of December, 1952, at Pasadena, California, in consideration of a premium, Girard issued to plaintiff a standard California form of fire insurance policy No. 2702, and attached thereto extended coverage endorsement, building equipment and stock

form No. 78, wherein the named insureds were plaintiff and Raymond D. Stivers, dba Stivers Packing Company, and attached thereto a lender's loss payable endorsement, making loss payable, first to Farmer's and Merchant's Bank of Long Beach, and insured plaintiff and said Raymond K. Stivers in the amount of \$10,000 as follows:

\$5,000 for said packing house and loading platform;

\$5,000 for said equipment. [88]

VI.

It is true that at the request of plaintiff, through his agent Truman B. Stivers, acting as the agent of plaintiff, on or about the 1st day of December, 1952, at Altadena, California, State, in consideration of a premium, issued a standard California form of fire insurance policy No. 101260 and attached thereto an extended coverage endorsement, loss payable endorsement, and building, equipment and stock form No. 78, making the loss payable, first to said Farmer's and Merchant's Bank of Long Beach, whereby State insured plaintiff against loss or damage by fire in the amount of \$7,500 as follows:

\$3,000 for said packing house and loading platform;

\$2,500 for said equipment;

\$1,500 for said stock; and

\$500 for said storage building.

VII.

It is true that at the request of plaintiff, through

his agent Truman B. Stivers, on or about the 1st day of December, 1952, at Altadena, California, in consideration of a premium, Queen issued a California form standard fire insurance policy No. 101260 and attached thereto extended coverage endorsement, building, equipment and stock form No. 78, loss payable endorsement with the loss payable, first to said Farmer's and Merchant's Bank of Long Beach, whereby Queen insured plaintiff against loss by fire in the amount of \$12,500, as follows:

\$5,000 for said packing house and loading platform;

\$5,000 for said equipment;

\$2,000 for said stock; and

\$500 for said storage building.

VIII.

It is true that through mistake the name of said Raymond K. Stivers was included as a named insured under said insurance policy of said Girard, and that prior to the issuance of said policy said Raymond K. Stivers had transferred all his right, title [89] and interest in and to said buildings and personal property, and did not have an insurable interest in either said buildings or personal property at the time of said fire.

IX.

It is true that prior to said fire said Farmer's and Merchant's Bank of Long Beach was paid in full and released all its interest in and to said insurance contracts and said Farmer's and Mer-

chant's Bank of Long Beach was not a loss payee under any of said insurance policies at the time of said fire.

X.

It is true that on the 13th day of October, 1954, and while said insurance was suspended, a fire originated in said citrus fruit packing house and destroyed said packing house and loading platform, equipment, stock and said storage building.

XI.

It is true that at the time of said fire said citrus fruit packing house and loading platform was of a cash value in an amount in excess of \$18,000, said equipment was of a cash value in an amount in excess of \$12,500.00, said stock of field boxes and supplies was of a cash value in an amount in excess of \$5,000.00 and said storage building was of a cash value in an amount in excess of \$2,500.00; and that plaintiff's loss and damage by reason of said fire was in excess of said sum of \$18,000.00 on account of said packing house and platform damage, said sum of \$12,500.00 on account of said equipment damage, said sum of \$5,000 on account of said stock, field boxes and supplies and said sum of \$2,500.00 on account of said storage building damage.

XII.

It is true that each of said defendants extended said plaintiff's time within which to file a written Proof of Loss to and including the 15th day of January, 1955, and that on or about December 21,

1954, plaintiff filed a written Proof of Loss with each of said [90] defendants.

XIII.

It is true that each of said California standard fire insurance policies provided, in part, as follows:

(a) Lines 28 to 34 of said policy:

“Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto, this company shall not be liable for loss occurring * * *; or (b) while a described building, whether intended for occupancy by owner or tenant, is vacant or occupied beyond a period of 60 days; * * *”

(b) Paragraph 21 of said Building, Equipment and Stock form provides, in part, as follows:

“Vacancy-Unoccupancy Clause: Permission is granted to remain vacant or unoccupied without limit of time, Except As Follows: * * *; (2) if the subject of insurance (whether building or contents or both) is a cannery, fruit, nut, or vegetable packing or processing plant * * * permission is granted (a) to remain vacant not to exceed sixty (60) consecutive days, and (b) to remain unoccupied but not Vacant for not to exceed ten (10) consecutive months.”

(c) Lines 149 to 152 of said California standard fire insurance policy provide, in part, as follows:

“Suit: No suit or action on this policy for the recovery of any claim shall be sustainable

in any court of law or equity unless all of the requirements of this policy shall have been complied with * * *

XIV.

It is true that at all times since each of said policies and endorsements were issued to plaintiff, and for more than ten (10) [91] consecutive months prior to said fire plaintiff knew; First, that under the terms of each of said policies and endorsements that in the event said citrus fruit packing house was not operated as a citrus fruit packing house for a period of more than ten (10) consecutive months it would be, and was unoccupied within the meaning of said occupancy provisions, the insurance thereunder would be, and was, suspended during the period it was not in operation in excess of said ten (10) consecutive months; and, Second, that neither said policies nor endorsements provided for a watchman at the premises in lieu of said occupancy.

XV.

It is true that said citrus fruit packing house was unoccupied for more than ten (10) consecutive months prior to said fire and at the time of said fire the insurance under each of said insurance contracts was suspended by reason of such unoccupancy in excess of ten (10) consecutive months.

XVI.

It is untrue that defendant Queen or State waived said unoccupancy provisions or released or discharged plaintiff from compliance with said un-

occupancy provisions of said insurance contracts; further, it is untrue that defendant Queen or State is estopped from asserting said unoccupancy provisions of said insurance contracts.

XVII.

It is untrue that plaintiff hired or maintained a watchman on said premises at all times after the issuance of said policies and until said property was destroyed by fire.

XVIII.

It is true that said premises were not occupied as contemplated by plaintiff and National, Girard, State or Queen under said insurance contracts for more than ten (10) consecutive months prior to or at the time of such fire.

XIX.

It is true that neither said loss nor any part thereof has been paid by National, Girard, Queen or State. [92]

XX.

It is untrue that Raymond K. Stivers, Howard Stivers or said Farmer's and Merchant's Bank of Long Beach is a real party in interest herein.

Conclusions of Law

As a conclusion of law the Court determines:

1. Each of said insurance contracts insured such citrus fruit packing house as a citrus fruit packing house within the contemplation of the plaintiff and

each of said defendants National, Girard, Queen and State.

2. The fire insurance under each of said insurance contracts was suspended at the time of said fire and loss because said citrus fruit packing house was unoccupied for a period of more than ten (10) consecutive months prior to said fire, and plaintiff did not comply with any agreement on his part to maintain a watchman on said premises at all times in lieu of the compliance with said unoccupancy provisions of said insurance contracts.

3. Neither defendant Queen nor State waived its right to or is estopped to assert that such unoccupancy in excess of ten (10) consecutive months suspended said insurance prior to and at the time of said fire and loss.

4. Each of said defendants National, Girard, State and Queen is entitled to a judgment that plaintiff take nothing herein, and each of said defendants National, Girard, State and Queen have judgment against plaintiff for its costs incurred herein.

Let Judgment be entered accordingly.

Dated: May 11, 1956.

/s/ BEN HARRISON,
United States District Judge.

Affidavit of service by mail attached.

Lodged May 2, 1956.

[Endorsed]: Filed May 11, 1956. [93]

In the District Court of the United States, Southern
District of California, Central Division

No. 18737-BH

MORGAN A. STIVERS,

Plaintiff,

vs.

NATIONAL AMERICAN INSURANCE CO., a
Corporation, et al.,

Defendants.

JUDGMENT

The above-entitled cause having been tried before the Court, Judge Ben Harrison presiding, and sitting without a jury, a jury trial having been expressly waived by the respective parties, Augustus Castro, Esq., appeared as attorney for defendants National American Insurance Co., a corporation, Girard Insurance Company of Philadelphia, Pennsylvania, a corporation, The Insurance Company of the State of Pennsylvania, a corporation, and Queen Insurance Company of America, a corporation; and Howard Stump, Esq., appeared as attorney for plaintiff Morgan A. Stivers, oral and documentary evidence having been introduced and fully considered by the Court, the Court having made and filed herein Memorandum Opinion for Judgment for said defendants and thereafter the Court having made and filed and caused to be entered herein its written Findings of Fact and Conclusions of Law, and having ordered judgment to

be entered in favor of each of said defendants,
Now, Therefore, by reason of the premises,

It Is Hereby Ordered, Adjudged and [94] De-
creed:

1. That plaintiff take nothing by this action.

2. That each of the defendants National Amer-
ican Insurance Co., a corporation, Girard Insurance
Company of Philadelphia, Pennsylvania, a corpora-
tion, The Insurance Company of the State of Penn-
sylvania, a corporation, and Queen Insurance Com-
pany of America, a corporation, recover from plain-
tiff Morgan A. Stivers its costs of suit incurred
herein taxed at the sum of \$79.82.

Dated: May 11, 1956.

/s/ BEN HARRISON,

United States District Judge.

Affidavit of service by mail attached.

Lodged May 2, 1956.

[Endorsed]: Filed May 11, 1956.

Docketed and entered May 14, 1956. [95]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Morgan A. Stivers,
plaintiff above named, hereby appeals to the United

States Court of Appeals for the Ninth Circuit from the Judgment entered in this action on May 14, 1956.

SIMPSON, WISE &
KILPATRICK,
HARWOOD STUMP,
HENRY T. LOGAN,

By /s/ GEORGE E. WISE,
Attorneys for Plaintiff.

Affidavit of service by mail attached.

[Endorsed]: Filed June 13, 1956. [97]

In the United States District Court, Southern
District of California, Central Division
No. 18737-BH

Honorable Ben Harrison, Judge Presiding.

MORGAN A. STIVERS,

Plaintiff,

vs.

NATIONAL AMERICAN INSURANCE COM-
PANY, a Corporation; GIRARD INSUR-
ANCE COMPANY OF PHILADELPHIA,
PENNSYLVANIA, a Corporation; THE IN-
SURANCE COMPANY OF THE STATE OF
PENNSYLVANIA, a Corporation; QUEEN
INSURANCE COMPANY OF AMERICA, a
Corporation; and DOES I TO X, Inclusive,
Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Tuesday, February 21, 1956

Appearances:

For the Plaintiff:

MESSRS. HARWOOD STUMP, and
HENRY T. LOGAN.

For the Defendants:

MESSRS. COOLEY, CROWLEY,
GAITHER, GODWARD, CASTRO &
HUDDLESON, by
AUGUSTUS CASTRO, Esq.

The Court: You may proceed.

The Clerk: No. 18737-Y, Morgan A. Stivers vs.
National American Insurance Company and others
for trial.

Mr. Stump: The plaintiff is ready.

Mr. Castro: The defendants are ready, your
Honor.The Court: Which of you gentlemen is Mr.
Stump?

Mr. Stump: I am Mr. Stump, your Honor.

The Court: And who is representing the other
side?

Mr. Castro: Mr. Castro, your Honor.

Mr. Stump: At this time, your Honor, I would
like to announce associated with me is Mr. Henry
T. Logan at counsel table.

The Court: Take your order.

As I understand this case, gentlemen, it involves four insurance policies; does it not?

Mr. Logan: Yes.

Mr. Castro: Yes.

The Court: There is really only one issue to be tried; is there not?

Mr. Castro: I think it comes down to about one issue, your Honor.

The Court: In other words, the plaintiff has complied with all the provisions of the policies so far as proof of [5*] loss is concerned.

Mr. Stump: That is correct, your Honor.

The Court: The defense is that the buildings were unoccupied for more than 10 months.

Mr. Castro: Yes.

The Court: And is that not the real issue?

Mr. Castro: Yes, your Honor.

Mr. Stump: That is correct.

Mr. Castro: And the amount of damage is admitted to the extent of the limits of the policies.

The Court: Why can't we go right into that issue?

Mr. Castro: Yes; I think we may.

Mr. Stump: If it is necessary to reach that issue, your Honor, we have a problem there.

Under the terms of all of the policies, which are identical in terms and are standard California fire insurance policies, the buildings are insured while occupied as a packing house and loading platform. Then an exception is made in the stock form 78 that permission is granted to remain unoccupied

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

without limit of time except if the subject of the insurance is a nut, fruit or vegetable packing plant or processing plant and then permission is granted to remain unoccupied for not to exceed 10 consecutive months.

The question at the outset is, there is nothing on the face of the policies or on the face of the pleadings to show [6] that this insured premises are a nut, fruit or vegetable packing or processing plant and therefore we would come under the provisions of the policies which waives or gives permission to remain unoccupied without limit of time. Nor is there anything in the defendants' answers which alleges affirmatively or otherwise, that the insured premises were a fruit, nut or vegetable packing or processing plant.

Therefore, at that state of the pleading the question is whether or not without an affirmative allegation on the part of the defendants that the premises were a nut, fruit or vegetable packing plant, the question is does not the permission to remain unoccupied without limit of time, attach and therefore we never come to the problem of occupancy on this question.

The Court: Counsel, you can always amend pleadings to conform to the facts. What was the plant used for?

Mr. Stump: It was originally, in 1943 when acquired by the plaintiff, it was an orange packing plant.

During the time that it was used it was so used and our evidence will show that in August of 1949,

several months before the issuance of the initial policies, the plant was closed and remained closed until the time of the fire.

So, on the date of the issuance of the initial policies and three years later on the date of the re-issuance of the renewal policies and one additional new policy, the plant was [7] not occupied as a fruit packing plant and it never had been during the life of either one of those policies.

So, the problem immediately arises: Was it the intention to insure it as a fruit packing plant?

The difference between a packing plant and a fruit packing plant is considerable because if they had intended to insure it as a fruit packing plant it would have so read in the insuring clause of the policies.

The Court: Aren't the questions involved here primarily questions of law or an interpretation of the policies?

Mr. Stump: We come to that issue; yes.

There is a considerable amount of law involved in interpreting what is meant by these policies, but in order for the policies to be given the proper construction it is also, I believe, necessary to apprise the court of the circumstances surrounding the transaction at the time the policies were entered into, so that the court can place itself in the position of these parties making these contracts of insurance.

The Court: Well, to what extent can you stipulate as to the facts in that regard?

Mr. Stump: We are prepared to stipulate, and

I am sure counsel will also, that the plaintiff's plant was not occupied as a fruit packing plant from August 31, 1949, until the date of the fire.

Mr. Castro: That is not the information that I have, [8] counsel. My information is that the last time the packing shed was operated was during 1952—1951-'52 season and not after July 1 of 1952.

Mr. Stump: Well, we are prepared to offer evidence on that. I guess after all we can't stipulate to it. Our evidence will show that the American Fruit Company's lease was terminated on August 31, 1949, and that no other persons operated that plant as a fruit packing plant after that day.

The Court: Is an orange packing plant any different from a fruit packing plant.

Mr. Stump: No, sir. We will stipulate it was an orange packing plant. An orange, I suppose, is a kind of fruit except when it freezes and then I don't know what it is.

The Court: I happen to be interested in an orange grove and I was wondering if we were raising fruit or something else.

I am ready to listen to the facts, gentlemen, and then we will try to straighten out what we consider to be the law of the case.

Mr. Castro: At this time on behalf of each of the defendants, your Honor, I will ask the witnesses be excluded during the taking of testimony.

The Court: If that request is made all witnesses who expect to testify in this case will be required to retire to the witness room. The plaintiff may

remain in the courtroom and you may call your first witness. [9]

Mr. Stump: The plaintiff is our first witness. We will call him at this time.

MORGAN A. STIVERS

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Morgan A. Stivers.

Mr. Stump: Before commencing the interrogation of the witness, your Honor, I would like to clarify one thing and that is we have under subpoena an officer of the Farmers & Merchants Bank of Long Beach. He may not understand that he is a witness and I would like permission to inquire if he is in the courtroom.

The Court: What is the purpose of that witness?

Mr. Stump: For the purpose of proving that the loss payable to the Farmers & Merchants Bank had been paid prior to the issuance of the policy sued on and they have no insurable interest in the premises.

Mr. Castro: If the officer is here and would just state that, your Honor, we would accept it.

Mr. Stump: Is the representative of the Farmers & Merchants Bank here?

(No response.)

The Clerk: Was he subpoenaed to appear in this courtroom or the courtroom across the [10] hall?

(Testimony of Morgan A. Stivers.)

Mr. Stump: He was subpoenaed to appear in Courtroom No. 7.

The Clerk: Then he may be over there.

Mr. Logan: May I have permission to inquire, your Honor?

The Court: Yes. I am curious as to how this case happened to land in the Southern District of California.

Mr. Stump: It was our theory at the time that the policies being purchased here—were issued here; that the insurance proceeds were to be paid here and therefore the proper place was for the action to be filed here.

We filed it in the Superior Court and the defendant did us the favor of moving it to the Federal Court where we could get a hearing much earlier than we would if we had been in the State court. And that is the history on that, your Honor. The property actually is situated at Side Station in Tulare, California.

The Court: That is in the Northern Division.

Mr. Stump: Yes. And all the defendants are foreign corporations.

The Court: You may proceed.

Direct Examination

By Mr. Stump:

Q. Will you state your name for the record, Mr. Stivers?

A. Morgan A. Stivers.

(Testimony of Morgan A. Stivers.)

Q. And are you the owner of property at Side Station, [11] three miles north of Lindsay in Tulare County, California? A. Yes; I am.

Q. Would you mind speaking a little louder, please, so I can hear you?

When did you acquire that property, Mr. Stivers?

The Court: There is no question of ownership; is there, counsel?

Mr. Castro: I do not believe so, your Honor. The only question that I have in that respect is whether his brother, Howard Stivers, has any insurable interest in the property.

Mr. Stump: I will come to that question.

Q. (By Mr. Stump): The title of this property is taken in whose name, Mr. Stivers?

A. Morgan A. Stivers and Virginia E. Stivers, my wife.

Q. Does Howard Stivers have any record interest in this property? A. No.

Q. Does he have any interest of any kind in the property at this time? A. No; he does not.

Q. Did he at the time these insurance policies that are being sued on here were taken out?

A. No.

Q. That is December 1, 1952?

A. No; he did not. [12]

Q. He had no interest at that time?

A. No.

Q. Has he had any interest since that time?

A. No.

(Testimony of Morgan A. Stivers.)

Q. Now, did Raymond K. Stivers have an interest in the property after you acquired it?

A. Yes.

Q. And what was that interest?

A. A one-third interest.

Q. Does he still have that interest?

A. No.

Q. When did he dispose of that interest, to your knowledge?

A. I believe it was sometime in 1952 that I bought his interest out from a debt that he owed me.

Q. Was that prior to December 1st of 1952?

A. Yes.

Q. At the time these policies in question were issued Raymond Stivers had no interest in the property; is that your statement?

A. That is right.

The Court: Is this your banker?

Mr. Logan: That is the gentleman.

The Court: If you so desire you may withdraw this witness and put on your banker. [13]

Mr. Castro: This is the agent for——

Mr. Stump: This is your witness.

Mr. Castro: Yes. This man is agent for two of the companies, your Honor. He is not the man from the bank.

The Court: I understood counsel was calling the bank manager or somebody from the bank.

Mr. Castro: That is what I understood.

Mr. Stump: I have had a subpoena served on a

Mr. Wessenberg (phonetic), vice-president of the Farmers & Merchants Bank, and I talked to Mr. Wessenberg and I was assured either he or some representative of the bank would be here. However, apparently, an error was made. We assumed that this gentleman here was that person and he is now on the stand out of order and is a defense witness, so apparently our witness from the bank has not yet arrived, your Honor. And that is the only explanation I can make.

Mr. Castro: May Mr. McMillan be withdrawn, your Honor. It is entirely a mistake.

The Court: Yes. Mr. Stivers will take the stand again.

MORGAN A. STIVERS

a witness called on behalf of the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Q. (By Mr. Stump): Now, at the time you acquired this property, Mr. Stivers, was there any encumbrance on it? [14]

A. Yes. I gave back a trust deed.

Q. To whom was that trust deed given?

A. To Lowell Washburn, the party I purchased the property from.

Q. Was that trust deed subsequently paid or was it on the property at the time of the issuance of these policies? A. It was paid off.

Q. Was there any other encumbrance incurred against the property after you acquired ownership?

A. Yes; a loan from the Farmers & Merchants Bank in Long Beach.

(Testimony of Morgan A. Stivers.)

Q. And what was the amount of that loan?

A. \$15,000.

Q. Do you recall on or about when it was incurred, the indebtedness?

A. I believe it was in '48.

Q. And do you know when it was paid, if at all?

The Court: Was that in the form of a trust deed?

The Witness: Yes; trust deed on the property.

The Court: Wouldn't the records show that, counsel—that the encumbrance was satisfied? It should be of record.

Mr. Castro: No; it was not, your Honor. Our review did not disclose it but the bank was, and the plaintiff's request, made a loss payee on three of the policies.

The Court: I mean whether the bank has any claim at [15] this time. If the trust deed has been satisfied then they have no claim.

Mr. Castro: There was never—we could not ascertain from the bank—the bank refused to disclose to us their indebtedness.

The Court: What I am getting at is that the records of Los Angeles County should disclose that.

Mr. Castro: We did not find any trust deed recorded in Tulare County covering this property to the Farmers & Merchants Bank.

The Court: We will have to wait for the banker then.

Mr. Stump: I might say this, your Honor. I

(Testimony of Morgan A. Stivers.)

have shown counsel the original policies with the mortgagee loss payable clause on them which shows a written release on them by the bank, but of course counsel does not know that the bank actually put that on there until we bring someone in from the bank to so testify.

At this time I am attempting to have Mr. Stivers state that the obligation was paid.

The Witness: It was paid off in December of 1951.

Q. (By Mr. Stump): December of 1951?

A. Yes.

Q. And these policies here sued on were issued on or about December 1st of 1952; is that right?

A. Yes. [16]

The Court: What was the date of the fire?

Mr. Stump: The date of the fire of Mr. Stivers' property?

The Witness: October 13, 1954.

Q. (By Mr. Stump): Now, did Howard Stivers have any interest in this property? A. No.

Q. That is at the time of taking out of the policies he had no interest in the property?

A. No.

Q. Now, Mr. Stivers, what was the nature of these insured premises, the general nature of them?

A. It was an orange packing house, bulk house and loading platform and a storage building, cull bin and all the equipment and machinery necessary to operate a packing house.

Q. You say these premises burned on October

(Testimony of Morgan A. Stivers.)

15, 1954; is that right? A. Yes.

Q. And what—well, actually the amount of the structure is not in issue. I will withdraw the question.

Now, did you at any time apply for insurance on these premises? A. Yes.

Q. And do you recall whom you made your application to? A. Truman Stivers. [17]

Q. He is your nephew? A. Yes.

Q. Do you know about when you made your first application to him for insurance?

A. Well, on this property I believe it was in 1949.

Q. And prior to that had you had—did you have insurance on the property through another agent?

A. Yes; another agent at Lindsay, California.

Q. And at the time you made application to Truman B. Stivers for the insurance in 1949 were you packing oranges at this plant? A. No.

Q. How long prior to that time had it been since you had packed oranges or anything at this plant?

A. Well, it was at the expiration of the American Fruit's lease which expired August 16, I believe it was, in 1949.

Q. During the time the American Fruit Company were in the plant, in occupancy, they had packed oranges and fruit in the plant; is that right?

A. Yes.

Q. Now, since the American Fruit Company left in August of 1949 has there been any fruit packed in this plant? A. No; there has not.

(Testimony of Morgan A. Stivers.)

Mr. Stump: At this time, your Honor, I want to have the witness identify four policies that were issued and then [18] offer them into evidence.

This being my first appearance in the Federal Court I don't know whether I am permitted to approach the witness or not.

The Court: You may.

Mr. Stump: Thank you.

Mr. Castro: It will be stipulated, your Honor, that those are the four policies together with the endorsements, and they may be marked as exhibits if your Honor so orders it.

The Court: They will be introduced as the first four exhibits to the plaintiff's case. Hand them to the clerk and he will mark them.

Mr. Stump: May I request the American National Policy be offered as Plaintiff's No. 1?

The Clerk: Plaintiff's Exhibit 1.

(The exhibit referred to, marked Plaintiff's Exhibit No. 1, was received in evidence.)

Mr. Stump: Girard Insurance policy as Plaintiff's No. 2.

The Clerk: Plaintiff's Exhibit 2 in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 2, was received in evidence.)

Mr. Stump: The Insurance Company of the State of Pennsylvania as Plaintiff's Exhibit No. 3.

The Clerk: No. 3 in evidence. [19]

(Testimony of Morgan A. Stivers.)

Mr. Stump: And the Queen Insurance Company as Plaintiff's Exhibit No. 4.

The Clerk: Plaintiff's Exhibit 4 in evidence.

(The exhibit referred to, marked Plaintiff's exhibit 4, was received in evidence.)

Q. (By Mr. Stump): Now, Mr. Stivers, prior to December 1st of 1952 do you recall what insurance you had on the premises and with what companies you had this insurance?

The Court: You are not claiming any more insurance than is represented by these four policies, are you?

Mr. Stump: Well, your Honor, three of the companies whose policies are here had insurance prior to December 1 of 1952. One company that held a policy at that time, Fulton Insurance Company, did not renew. A new company came in, the National American Insurance Company, which is Plaintiff's Exhibit No. 1.

At this time I want to put that into evidence as background for certain arguments on this issue of estoppel or waiver.

Mr. Castro: The policies should show on their face whether or not they are new or renewal policies. That is normally stated on the face of the policy.

Mr. Stump: I believe it does.

At this time then I assume that counsel will stipulate that the policies of all but the National American Insurance [20] Company were renewal policies

(Testimony of Morgan A. Stivers.)

since it shows on their face that they were such.

Mr. Castro: I think that is correct.

Q. (By Mr. Stump): Now, Mr. Stivers, at the time you made application to Truman D. Stivers for the renewal of these policies—for the policies which are here being sued upon, do you recall the circumstances or what occurred at that time?

A. I believe that Truman Stivers called my office and told us that they were coming up for renewal.

Q. That was some time—do you recall about when that was? A. I believe it was in October.

Q. Of 1952?

A. Yes; 1952. And the policy was coming up for renewal, I believe, in December of '52.

Q. And at that time did you—was the packing plant in operation? A. No.

Q. As a fruit packing plant?

A. No; it wasn't. It was only occupied by the person living on the property.

Q. You mean that there were persons living on the property? A. Yes.

Q. But the property was not actually operating as a [21] fruit packing plant at that time?

A. No.

Q. Did you advise Mr. Truman Stivers the amount of insurance coverage that you wanted at that time? A. Yes; \$40,000.

Q. And did you advise him as to anything else concerning the insurance at that time?

A. Well, that the packing house wasn't in operation.

(Testimony of Morgan A. Stivers.)

Mr. Castro: As to that, your Honor, I move to strike as to the defendant Queen Insurance Company and Insurance Company of the State of Pennsylvania on the ground that it is hearsay since Mr. Truman B. Stivers was not an employee or agent or representative of either of those two defendants at any time.

The Court: I don't know yet.

Mr. Castro: Well, I am making the objection. There is no proper foundation being laid so far as those two companies are concerned and is hearsay testimony.

The Court: Counsel, I realize there are some legal points involved but I think I should have the facts.

Mr. Castro: Yes; I do, too, your Honor.

The Court: I will overrule the objection at this time, reserving you the right to make a motion to strike.

Mr. Castro: Thank you, your Honor.

Q. (By Mr. Stump): Now, Mr. Stivers, of your knowledge, [22] was Truman B. Stivers acquainted with this property in Lindsay?

Mr. Castro: Object to that as calling for his conclusion and opinion.

The Witness: Yes.

Mr. Castro: Calling for his opinion and conclusion and not for a fact—concerning another man's knowledge.

The Court: As I understand, you said this man was your nephew?

(Testimony of Morgan A. Stivers.)

The Witness: Yes, sir.

The Court: Where did he have his office?

The Witness: Pasadena.

The Court: Have you ever seen him around the packing house?

The Witness: Oh, yes; lots of times. He owned property around Lindsay and he was up there often and stopped by the packing house.

Q. (By Mr. Stump): You had seen him on the packing plant property, had you, prior to the issuance of these policies? A. Yes.

Q. And were his trips—was that on more than one occasion?

A. Yes; I saw him there a number of times.

Q. And you know of your own knowledge that he owned property in that area himself and was frequently up in that vicinity; is that right? [23]

A. Yes.

Q. Now, did you ever have any discussion with Mr. Truman Stivers or with his office, regarding the operation of that packing plant prior to the issuance of these policies that are here being sued on?

A. Yes. I had talked to him several times and he had with me that the packing house wasn't in operation.

Mr. Castro: Just a moment. May I interrupt, your Honor, to interpose the same objection that I did on behalf of the defendant Queen——

The Court: Counsel, I recognize there is a close point as to the limitations of an agent of an insurance company that sells insurance and that of being

(Testimony of Morgan A. Stivers.)

a representative of the company; but I think the court should have the facts from which I can draw a conclusion as to whether or not he had certain information. Now, whether that information is information of the company is a different thing.

Mr. Castro: Yes, your Honor. Rather than interpose these objections each time perhaps counsel will stipulate——

The Court: Are you going to have the agent here?

Mr. Stump: He will be the next witness up, your Honor.

I will stipulate with counsel if the court finds that Truman B. Stivers was not an agent of any one of these companies, that as to that company the conversation between Morgan Stivers and Truman B. Stivers would have no import—would [24] impart no knowledge to them—would not be binding on them.

Mr. Castro: I will accept that stipulation, your Honor.

Mr. Stump: This is sort of like a circle. We have to hop on the rim somewhere in order to start.

The Court: I realize that, counsel.

Q. (By Mr. Stump): Now, Mr. Stivers, will you state whether or not Mr. Truman Stivers ever called you concerning the operations of this packing plant prior to the issuance of these policies?

A. Yes; the first time that——

Mr. Castro: I think the question has been answered.

(Testimony of Morgan A. Stivers.)

The Witness: I talked to him about the insurance, oh, it was back in '49 when he asked—he was at the packing house and asked me about rewriting the insurance that was coming up and that was held by the Lindsay Company and which I told him he could write because he had been our agent since he had his license of taking care of all of our insurance.

Q. (By Mr. Stump): Now, between the time of writing these first policies and the time of renewing some of the policies and writing a new policy, did he have any contact with you or talk to you about the operating of the packing plant?

A. Yes. We talked about it but he knew it wasn't in operation; which it wasn't.

Q. Well, now, you tell us about when this conversation [25] took place, if you recall.

A. After he had placed the policies.

Q. The first time and before they were placed the second time?

Mr. Castro: Object to that as leading and suggestive.

Mr. Stump: I am trying to lay a foundation for a conversation, your Honor, some time within a period of time. This is a nephew of the witness and they no doubt had many conversations.

I didn't intend to lead him, counsel. I am merely trying to assist him to give us the conversation.

The Court: We haven't a jury here.

Mr. Castro: I realize that, your Honor. I examined this man under oath a year and a half ago

(Testimony of Morgan A. Stivers.)

and I know what his answers were then and I don't think he should be led at this time.

The Court: Try not to lead, counsel.

The Witness: I talked to Truman Stivers several times during that time about the packing house.

Q. (By Mr. Stump): Do you recall on or about the time of the first conversation?

A. (No answer.)

Q. Can you fix it in your mind as to a month or year?

A. Well, I would say it was along some time in '50, 1950 I will say, the first part of 1950. [26]

Q. And where did the conversation take place?

A. I believe that was at the packing house.

Q. Were you at the packing house, both of you, at the time? A. Yes.

Q. Now, will you tell the court——

The Court: Was the packing house in operation at that time?

The Witness: No; it was not in operation. We were talking about it—that we didn't know when we would ever be operating it again and I believe he said at that time——

The Court: Are you having as much trouble in the orange industry up north as we do down south?

The Witness: More. In 1948 and 1949 we had practically a total freeze and the trees were damaged some and we sold most of the groves.

We were packing our own fruit before when we leased to the American Fruit Company.

Q. (By Mr. Stump): At the time of this con-

(Testimony of Morgan A. Stivers.)

versation, Mr. Stivers—I am sorry but I can't hear you, sir, when you answer. If you will tell us what this conversation was.

A. Well, the best I recall it was about the—we weren't going to operate the packing house any more and I told him of course that we didn't know whether we would ever operate it any more and I believe he said at that time, "You will have [27] to keep someone on the property if it is not in operation," which we did have someone living on the property and had them there all the time.

Q. You thereafter had someone living on the property, is that what you said? A. Yes.

The Court: Which part of the property?

The Witness: Well, living at the packing house. He told me that for our insurance to be in force that there had to be someone living on the property.

Q. (By Mr. Stump): Now, Mr. Stivers, will you explain to the court where you had this person or persons living on the property?

Mr. Castro: This is immaterial except as to the time of the fire, your Honor. This goes back to 1950.

Q. (By Mr. Stump): Well, at the time of the fire then, Mr. Stiver—I will withdraw the other question, Mr. Stivers.

At the time of the fire who was living there?

A. At the time of the fire the fellow we had on the property was living in his trailer there right beside the packing house and which some of his stuff burned in the fire. He set his trailer close to the

(Testimony of Morgan A. Stivers.)

packing house in order to hook up to the sewer and the electricity.

Q. Now, did you have any conversation with Truman B. Stivers after this one early in 1951, I think you said, or [28] 1950. I am not sure of those dates. Did you have any other conversations respecting the operating of the packing house after that first conversation that you have testified to?

A. Yes. I would say several different times because he was up and around Lindsay every few days and I was too along about that time and we would have a discussion about the packing house. I don't know what dates but a number of times.

Q. Now, Mr. Stivers, during the 10 months preceding the destruction by fire of these premises in 1954, had you been at the packing plant?

A. Yes, I was by there a couple of months before that time.

Q. And was anything done at that time?

A. Yes. There was some work being done on the packing house which I had helped one day with some other fellows putting a new roof on and some other repairs.

Q. What were the other repairs?

A. Well, the doors and windows and floor and they were doing some work on the equipment.

Q. By the "equipment"—was there any special equipment, any particular equipment that you recall you repaired?

A. Well, on the conveyor belts and stuff like that.

(Testimony of Morgan A. Stivers.)

Q. And you testified that yourself and others were there repairing it, is that correct? [29]

A. Yes.

Q. Now, about when in reference to October 13, 1954, was that?

A. I would say around the middle of August. Then there was some other work done on it after I was up there by some of my brother's men and our foreman that we did in seeing after our groves.

Mr. Stump: I take it, counsel, there is no need of going into proof of loss—that is all admitted.

Mr. Castro: That is all admitted in the pleadings.

Q. (By Mr. Stump): Now, Mr. Stivers, subsequent to the fire have you ever received any money from these defendants in payment of your loss? A. No, I have not.

Q. And have you made demand on them for payment?

The Court: There is no dispute about that, counsel.

Mr. Castro: None that I know of.

The Witness: Yes.

Mr. Stump: I think that is all we have of this witness at this time, your Honor.

The Court: Cross-examine.

Cross-Examination

By Mr. Castro:

Q. Mr. Stump, your nephew is Truman B. Stivers? A. Yes. [30]

(Testimony of Morgan A. Stivers.)

Q. And he became an insurance agent and went into the insurance business, did he, eventually?

A. Yes, he did and he wrote practically all of our insurance for several years.

Q. And he acted as an agent for you, did he, in taking care of your insurance? A. Yes.

Q. And that is true up to the time of this fire and up to the present time, I assume?

A. Yes.

Q. Now, at the time of the—strike that.

At the time these policies were issued in December of 1952, were you in a partnership agreement with Howard Stivers?

A. Not on the packing house, no.

Q. Did you have a partnership agreement with him?

A. We only have a verbal partnership agreement on the other business but not in the packing house.

Q. But your partnership agreement did not relate in any way to the Lindsay packing operations?

A. No.

Q. Or the property? A. No.

Q. Now, you have some other business, do you, that you follow besides the packing shed?

A. Yes, building business. [31]

Q. And that is located at Long Beach?

A. Yes.

Q. And that is the business in which Howard is a partner? A. Yes.

Q. Now, you originally packed your own orange

(Testimony of Morgan A. Stivers.)

crop in the shed, did you not? A. Yes, we did.

Q. And you packed in the shed until sometime—you packed your own crop until sometime in about 1949 or '50?

A. Well, I believe it was in 1947 when the American Fruit packed there for two years.

Q. You discontinued your own packing?

A. Yes.

Q. And then you leased it out to the American Fruit Company? A. Yes.

Q. Now, what type of crop of oranges was being packed there—was it a navel and Valencia crop?

A. Navels and Valencias and some grapefruit.

Q. What was the season for the Valencia packing season?

A. Well, the season in that district usually runs—of course it depends on the weather and the test of the fruit, but it usually runs from the 1st of April to the latter part of June. [32]

Q. And on the orange crop—the navel crop, what is the general period for the season in that district?

A. Oh, around the 1st of November to—it depends on the season and the test of the fruit, but generally up until as late as the latter part of March.

The Court: I know they are ahead of the Southern California growers in marketing their crops.

Q. (By Mr. Castro): Now, you have referred to being at the shed before the fire. The last time

(Testimony of Morgan A. Stivers.)

you were at the shed was about two months before the fire? A. Yes.

Q. And at the time of the fire the shed was not in use, so far as packing was concerned?

A. No.

Q. Now, you have mentioned a trailer which was at the shed on the day of the fire. Do you know who the owner of that trailer was?

A. Mr. Morris (phonetic), the fellow that we had on the property.

Q. Morris?

A. Yes, that lived in the trailer, he and his wife and his son.

Q. Now, did Mr. Morris have a job outside of that during the day?

A. I don't remember now whether he had a part-time job. [33] His wife and his son, they were all there, I understood, practically all the time—either one of them was.

Q. Well, you don't have any personal knowledge as to whether or not he was there, or any member of his family, on the day of this fire, do you?

A. Yes.

Q. Were you there on the day of the fire?

A. No.

Q. Were you in Long Beach on the day of the fire? A. Yes.

Q. And did you go to Lindsay on the day of the fire? A. No, I didn't.

Q. You personally didn't see Mr. Morris or any member of his family there on the day of the fire, did you?

(Testimony of Morgan A. Stivers.)

A. No. Truman Stivers, my agent, called. He happened to be at Lindsay and he called me and told me the packing house was burning and it had burned——

Mr. Castro: I move to strike the answer as hearsay.

The Witness: ——and it burned part of Mr. Morris' furniture.

The Court: I recognize that, counsel.

Q. (By Mr. Castro): Now, did you tell Mr. Morris or his wife or his boy that they had to spend any particular hours at the packing plant?

A. No. I didn't talk to them. My cousin was our [34] foreman up there.

Q. You didn't personally?

A. He made the arrangements with them and I told him that there had to be someone on the property all the time, which he said either one of his family was there at all times.

Q. You told your foreman that there had to be someone on the property at all times?

A. Yes.

Q. Now, did you know prior to this fire that your insurance would be jeopardized if the property was not being operated as a packing plant?

A. No, because Truman Stivers at the time the policies were placed on there and long before that, that there had to be someone living on the property and which we had someone living there.

Q. Isn't it a fact you knew that if the property

(Testimony of Morgan A. Stivers.)

wasn't being operated as a packing plant that your insurance would be jeopardized?

A. No. I understood from him that as long as there was someone on the property, living on the property——

Q. Do you recall, in December of 1954, that I came to your office in Long Beach with a reporter and notary public and I asked you questions?

A. Yes.

Q. On the subject of this loss? [35]

A. Yes.

Q. And thereafter the document was—the testimony was transcribed and the original was forwarded to you and you signed it? A. Yes.

Q. Now, when was the first time you had a conversation with Mr. Stivers, with Truman B. Stivers concerning the fact you were not going to operate the packing plant?

A. Well, I think I stated before it was along in 1949.

Q. And did you have more than one conversation with him? Was there more than one time when you had such a talk with him?

A. Yes, a number of times. [36]

Q. Isn't it a fact that you didn't tell Mr. Stivers, Truman B. Stivers, in 1949, that the plant was not to be operated as a packing shed either by you or anybody else?

A. What was the question?

Mr. Castro: Read the question.

(Question read.)

(Testimony of Morgan A. Stivers.)

The Witness: You are refreshing my memory about this since the hearing in Long Beach that I do remember conversations with Truman along at that time.

Q. (By Mr. Castro): You say someone has refreshed your memory?

A. Since December, 1954, I have refreshed my own memory.

Q. How did you refresh your memory, Mr. Stivers?

A. Well, after you were down that day, I got thinking about the packing house and how long it had been since it was operating, and the times Truman Stivers and also his father talked about it a number of times we visited together in Lindsay.

Q. You knew, did you not, prior to talking to Truman B. Stivers, that you had to have a watchman on the property in order to keep your insurance?

A. Not until he told me.

Q. Isn't that the reason you brought it up with Truman B. Stivers? [37]

A. No. He told me what we would have to have, someone living on the property.

Q. You had no knowledge of that subject until he told you?

A. No, I don't recall any reason why, only that he told me there would have to be someone on the property.

Q. But you didn't have any knowledge on that subject apart from what Truman B. Stivers told you?

A. I don't believe so.

(Testimony of Morgan A. Stivers.)

Q. Isn't it a fact that you only talked to Truman B. Stivers on one or possibly two occasions concerning this subject matter?

A. No. As I stated before, I talked to him a number of times. He was in Lindsay a lot and I was up there quite a lot, and we visited together in Long Beach. The family visited together a lot.

Mr. Castro: May I show this witness a statement?

The Court: Can't you stipulate that you can read the statement without going through all that rigamarole, what his testimony was at that time?

We will take our morning recess of five minutes at this time.

(Recess.)

The Court: You may proceed.

Mr. Stump: Your Honor, at the time of the recess [38] Mr. Morgan Stivers was on the stand under cross-examination by Mr. Castro. I have a problem which I discussed with Mr. Castro. One of our witnesses, whose testimony will be very short, is under subpoena to appear in a criminal matter at 2:00 o'clock this afternoon in Pasadena. He has kindly consented that we could put her on now and get her out of the way, if that is agreeable to the court.

The Court: That is satisfactory.

Mr. Stump: We will call Mrs. Florence Woods.

The Court: You may step down, Mr. Stivers.

We are moving along at an awfully slow rate of speed this morning.

Mr. Stump: Your Honor, we will try to speed it up. I regret the delay.

FLORENCE WOODS DINES

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Florence Woods Dines.

Direct Examination

By Mr. Stump:

Q. Mrs. Dines, what is your occupation?

A. I am general office manager for Truman Stivers.

The Court: You will have to speak up louder than that.

The Witness: I am sorry. I am general office manager [39] for Truman Stivers.

Q. (By Mr. Stump): How long have you worked for him, how long have you worked for him in that capacity? A. Since 1946.

Q. And that office is located where, Mrs. Dines?

A. 2674 East Walnut Street, Pasadena.

Q. As a part of your duties, do you take applications for insurance for Mr. Truman Stivers?

A. Yes, sir, I do.

Q. In the usual course of your business, how are those applications taken?

(Testimony of Florence Woods Dines.)

A. The applicant can call on the phone and I will take the information. I can relay it by telephone to our general agent either in Los Angeles or located there in Pasadena.

Q. Do you in the process of placing insurance call the insurance companies?

A. Yes, we do.

Q. Do you recall policies of insurance being made to Morgan Stivers relative to a packing plant property in Lindsay, California?

A. Yes, sir.

Q. Do you know on or about when that was?

A. We have an expiration file—or are you talking about the original policy? [40]

Q. No. Will you just tell us what you know about it at this point?

A. We take applications and write the policies, and when the—I mean the Los Angeles office or the main office, general office of the insurance company writes the policy, we process the signing of the policy and sending the bill and making the account receivable, and also an expiration notice. On the expiration notices, they are filed and 60 days before those policies become due again, we usually contact the assured, stating that the policy is becoming due, and we will renew the policy for them.

Q. Now, do you have any recollection of that procedure being followed in the case of the policies with the Girard, Queen, and State of Pennsylvania as to the packing plant property?

A. Yes, sir.

(Testimony of Florence Woods Dines.)

Q. Do you know on or about when it came to your attention that the then existing policies were expiring?

A. Approximately 60 days before they expire, sir, which would have been December 1, 1952, we pulled the expiration and contacted the assured for a renewal on that policy.

Q. Do you recall what took place—you say you did contact the assured?

A. Yes, the assured's office. [41]

Q. You personally contacted the assured's office?

A. That's right.

Q. Do you recall the conversation that took place at that time?

A. I called the assured's—

Mr. Castro: Just a moment. That is hearsay again as to the defendants Queen and Insurance Company of the State of Pennsylvania.

The Court: I will make the same ruling I made before, counsel.

Mr. Castro: Yes, your Honor.

The Witness: I contacted the assured's office and advised them how much insurance they had and asked his secretary to see if the amount was okay and give us an order for the renewal.

Q. (By Mr. Stump): Whom did you talk to in the assured's office?

A. Mrs. Zimmerman.

Q. Did she inform you at that time how much coverage, if any, Mr. Stivers wanted on the packing plant?

(Testimony of Florence Woods Dines.)

A. She said she would call back and she did.

Q. And on the return call, did she advise you?

A. She advised us that they would like 40,000.

Q. Did you have any other conversation with her between that time and the time of actually issuing and delivering [42] these policies concerning the issuance of this insurance?

A. I couldn't say for sure, but I don't believe I contacted her any further on that.

Q. You had two calls or two conversations with her? A. Yes, that's right.

Q. Have you testified as to all your conversation at that time respecting this insurance?

A. Yes, sir.

Q. Is there any further information respecting the issuance of these policies that, to your knowledge, you engaged in with Mrs. Zimmerman or with Morgan Stivers?

A. We did advise her that a caretaker was necessary on the premises.

Q. You say "we did." Did you? A. I did.

Q. Was that a part of one of these conversations? A. Yes, it was.

Q. Can you tell the court the words of the conversation to the best of your recollection, Mrs. Dines?

Mr. Castro: This is the same objection again, your Honor, with the further objection on behalf of all defendants that it is an attempt to modify and change the terms of a written contract which fol-

(Testimony of Florence Woods Dines.)

lowed this alleged conversation and the [43] policies.

The Court: The same ruling, counsel.

Mr. Castro: I am hesitant, your Honor, because oftentimes we sit back and don't—

The Court: I am not criticizing counsel, understand that, for making his objection, but, naturally, a case like this has to come in piecemeal and apparently this evidence is tying in a general agent, because the general agent wrote the policy, apparently, from this lady's testimony. She got the information and gave the information, passed it on to the general agent of the company, who prepared the policy, so I will make the same ruling. It is subject to a motion to strike.

I want to say that I know it is a close point when you can modify a policy by conduct of the parties. I recognize that. I had another case involving, not this question that we have here, the question of the vacancy of the premises, but other questions as to a policy of fire insurance, and I recognize it is necessary for me to get the facts, the whole facts, from which can be gleaned what the true picture is.

Mr. Castro: Yes. I agree with your Honor. Thank you.

The Court: This was a case involving an explosion, a fire, an explosion loss, whether there had been a waiver by a local agent of proof of loss. There were a few of the high points in that case that make me feel it is necessary [44] that I should get the whole picture before I attempt to try to

(Testimony of Florence Woods Dines.)

work out the answer. As a matter of fact, what I want to do in this case is to listen to the facts, and then I am going to have you gentlemen brief it. I notice you have got some books here, but I am not going to listen to any argument at this time, but I am going to make you brief it.

Mr. Stump: Your Honor, we would be very happy to put any information before the court that is necessary.

Q. Mrs. Dines, do you recall the question?

A. I believe it was my conversation with Mrs. Zimmerman, was it not?

Q. Yes. You were asked to tell the court to the best of your recollection what you said and what she said at that time.

A. I advised Mrs. Zimmerman in order to keep the insurance effective, we must have someone on the premises living there, and she said that they would have someone occupying the property at all times.

Q. That was prior to the issuance of these policies here? A. That's right.

Q. And thereafter did you take any further action to get these policies issued?

A. No, sir, I did not. I turned that over to the office secretary that was assisting me. [45]

Q. What is her name? A. Mrs. Heysler.

Mr. Stump: I have no further questions at this time.

(Testimony of Florence Woods Dines.)

Cross-Examination

By Mr. Castro:

Q. You have been with Mr. Stivers' office about how long? A. Since 1946.

Q. During all of that time have you served as an office manager? A. That's right.

Q. And how long have you been engaged in the insurance business?

A. I have worked in the insurance business since 1937.

Q. You are still employed by Truman B. Stivers? A. Yes, sir.

Q. Now, Mr. Truman B. Stivers, did he have any agency arrangement with the defendant Queen Insurance Company or the defendant Insurance Company of the State of Pennsylvania?

A. No. He does not have an agency with them.

Q. With reference to the Girard Insurance Company, did he have an agency appointment with it?

A. Yes, he does.

Q. And with reference to the National American Insurance [46] Company, did he have an agency appointment? A. Yes, he does.

Q. Did you have any policies in your office, blank forms of policies?

A. We have one copy of a blank form.

Q. What I am getting at is, did you have policies supplied to you in blank form by either the National American or the Girard Insurance Company? A. No, sir, we don't.

(Testimony of Florence Woods Dines.)

Q. Which would permit you to issue those policies without first getting the authority from the National American or the Girard?

A. No, we don't.

Q. So then Mr. Stivers or you or other employees in the office would then submit the proposal of insurance to either National American or the Girard, in this instance? A. That's right.

Q. They would either accept or reject that proposal of insurance? A. That's right.

Q. If they accepted it, the Girard or the National in turn would issue a policy and the necessary endorsements, which would be sent to your office?

A. Yes. But we do have the privilege of writing any endorsement that we want to on the policy. [47]

Q. In this instance, these policies which were issued on behalf of the defendant National and the defendant Girard, if you wish to examine them they are Exhibits 1 and 2 in the case, those two policies were written in the office of the Girard Insurance Company and the National American Insurance Company respectively? A. They were.

Q. And are those endorsements attached to each of those policies written in the office of National American and the Girard Insurance Company?

A. The endorsements were made at our office.

Q. What endorsements?

A. The signature, I mean, was made in our office.

Q. The policy and the endorsements were all

(Testimony of Florence Woods Dines.)

forwarded to you by the National American and Girard in those instances, were they not?

A. That's right.

Q. And then you were asked, Truman B. Stivers was asked to countersign the policies?

A. That's right.

Q. And the endorsements?

A. That's right.

Q. And to deliver them to Mr. Morgan S. Stivers? A. That's right.

Q. So is that what was done in this [48] instance? A. Yes, sir.

Q. Are you familiar with the Watchman's endorsement?

A. Yes, I know the Watchman's endorsement.

Q. You knew of it prior to the issuance of any of these policies to Morgan B. Stivers?

A. No. I have come in contact with that Watchman's endorsement since that time, in the last six months.

Q. You have been in the insurance business, you say, since 1937? A. That's right.

Q. And have never heard of a Watchman's endorsement? A. That's right.

Q. You have been assisting in the handling of the placing of policies, executing of policies?

A. That's right.

Q. Did you sign Truman B. Stivers' name to either one of these policies? A. I did not.

Q. Who did? A. Mrs. Heysler.

(Testimony of Florence Woods Dines.)

Q. After the policies were then signed by Mrs. Heysler, what was done with them?

A. They were sent to Morgan A. Stivers.

The Court: And the bill went along with it, didn't it?

The Witness: Yes, it did. [49]

Mr. Castro: I didn't get that.

The Witness: The bill accompanied the policy.

The Court: Because I have one on my desk now.

Q. (By Mr. Castro): The premium was paid, as I understand it. A. Yes, it was.

Q. How did you notify the National American concerning this insurance?

A. Mrs. Heysler did that, sir.

Q. You did not? A. No, I did not.

Q. How did you notify the Girard Insurance Company concerning this insurance?

A. Mrs. Heysler also did that.

Q. You did not participate in it?

A. No, I did not.

Mr. Castro: Is Mrs. Heysler going to be a witness, counsel?

Mr. Stump: Yes.

Mr. Castro: I believe those are all the questions I have, your Honor.

The Court: How is it it was not issued in one policy?

The Witness: On a large amount of insurance, even on large commercial buildings, insurance companies do not like to accept the full responsibility. They like to place it in [50] various companies so

(Testimony of Florence Woods Dines.)

that one company does not suffer the whole loss. When we wrote the policy on the new Masonic Temple in Long Beach, we had to have three companies on that building, too, even though it is a reinforced concrete building. One company wouldn't carry all the insurance.

Mr. Stump: I would like to ask several questions on redirect, if I may, your Honor.

The Court: All right.

Redirect Examination

By Mr. Stump:

Q. Mrs. Dines, speaking now of your usual office procedure, you would call one of the insurance companies asking them for a policy, is that right?

Mr. Castro: I object to it as being immaterial, irrelevant. The question is what they did in this particular instance, your Honor.

Mr. Stump: We are offering this evidence now as part of the evidence which will support a conclusion that applications were orally made by Truman B. Stivers to the insurance company for policies, and no written applications were required from the applying assured himself, so that ostensibly there was authority there for a—there was an ostensible authority there in the agent Truman B. Stivers to write that policy as it was given to him verbally by the applicant.

Mr. Castro: You have been misled by somebody, counsel. [51] I want you to be well aware, however, that I have in my file a written application by Tru-

(Testimony of Florence Woods Dines.)

man B. Stivers to two of these insurance companies for which he was agent, namely, the National American——

The Court: What materiality has that, counsel, in this case? The policies were issued and it is a question of whether they complied with the terms of the policies, and at this time you are attempting to modify the terms of the written policies, aren't you?

Mr. Stump: We are trying to say that the insurance companies are estopped to assert an unoccupancy clause, that is what we are trying to prove, either that, or that the contracting parties dealt with the term occupancy in a special way. There is a special significance to that term between the parties here.

The Court: I may be speaking out of turn, counsel, but these policies were written and issued in the usual course of business, the way they conduct their business. To what extent Truman Stivers had any authority here, and whether he had any authority from anybody else, I don't see where this witness' testimony will add or detract from that point.

Mr. Stump: I see.

The Court: He carried out the issuance of these policies in the regular course of business. She hasn't testified that there was any information communicated to the [52] issuing agents, general agents, who were probably in Los Angeles. Were the general agents in Los Angeles?

the National American is in Los Angeles.

The Witness: The Girard was in Pasadena, but

(Testimony of Florence Woods Dines.)

The Court: She hasn't testified there was any information carried to them or conveyed to them to the effect that there was any policy with any different meaning than stated on their face.

Mr. Stump: We withdraw the question now. I have no further questions of her.

The Court: Am I not correct on that, counsel?

Mr. Stump: Yes, your are correct. Here again we have three parties participating in this, all in the same office, Mrs. Dines, Mrs. Heysler, and Truman B. Stivers, and their testimony put together makes the whole, but one of them separately does not tell the whole story.

The Court: I know, but as far as her testimony is concerned, she just carried on as usual, she didn't convey any information to the agents that there has to be an occupancy of any kind. Did you?

The Witness: No, only to the assured.

Mr. Stump: But we have Mrs. Heysler, who did talk to them.

The Court: That's all.

The Witness: Thank you, Judge. [53]

The Court: May this witness be excused?

Mr. Stump: Yes, your Honor.

Mr. Castro: Yes, your Honor.

(Witness excused.)

The Court: Call Mr. Stivers back now. If you have any short witnesses, let's get rid of them, these people sitting out there in a room by themselves twiddling their thumbs, because they don't like it.

Mr. Stump: The only short witness I know of would probably be Mrs. Heysler, and we will probably take more than 20 minutes on her direct.

The Court: All right. Proceed.

MORGAN A. STIVERS

recalled as a witness herein, being previously duly sworn, was examined and testified further as follows:

Cross-Examination (Continued)

Mr. Castro: Counsel, as I understand it, will stipulate, your Honor, that at the time Mr. Morgan A. Stivers was examined under oath under the terms of each of these policies on December 29, 1954, before Notary Public S. S. Domurat, that he was asked the following questions and gave the following answers:

“Q. By Mr. Castro”——

The Court: You will have to speak a little louder, counsel, so the reporter can get this. [54]

Mr. Castro: Commencing page 31, line 22:

“Q. (By Mr. Castro): Did you ever discuss with Truman B. Stivers that you were not operating the packing shed? A. Yes; we notified him.

“Q. When did you do that?

“A. Well, it was back at the time we quit operating it.

“Q. That was in 1949 or 1950?

“A. Well, it was along about that time after we quit operating, after the years that the American Fruit Company used it.

(Testimony of Morgan A. Stivers.)

“Q. What did you tell him at that time?

“A. We told him we weren't operating the plant that fall. The first season was navels, of course, in the fall, and we weren't operating.

“Q. How did you happen to have that conversation? Was there any particular reason?

“A. Only that we heard or understood that you had to have a watchman on the property if you weren't operating, for the protection of the insurance.

“Q. Did Truman B. Stivers tell you that you had to have a watchman there? A. Yes.

“Q. Did he tell you that on more than one occasion?

“A. Well, I don't know. We probably talked about it a [55] time or so before we had someone move in there to watch it.

“Q. Did you ever talk to anybody else from the insurance company other than Truman B. Stivers, that is, before this fire loss? A. No.”

Is it stipulated, counsel, that those questions and answers were asked and given?

Mr. Stump: So stipulated.

Q. (By Mr. Castro): Now, were you acquainted with Roy A. McMillan prior to the issuance of these policies? A. No, I was not.

Q. Did you have any contact with Roy A. McMillan?

A. No. All my contact was through Truman Stivers.

Q. Following this loss, you executed a proof of

(Testimony of Morgan A. Stivers.)

loss in writing for each of the companies involved here? A. Yes.

Q. And who filled out those forms of proof of loss? Did you personally fill them out or have them filled out?

A. I had them filled out by Mrs. Zimmerman, our secretary and bookkeeper.

Q. Did you give her the information to insert in those proofs of loss? A. Yes.

Q. On each of the proofs of loss under paragraph 2, entitled Occupancy, the building described or containing the [56] property described was occupied at the time of loss as follows: Building, packing house, not in use.

Did you give her the information, "Building, packing house, not in use"? A. Yes.

Mr. Castro: Will it be stipulated, counsel, that that statement was made in proof of loss which was filed with each of the defendants herein and that the proofs of loss were sworn to on December 20, 1954, by Morgan A. Stivers before Notary Public Berenice D. Zimmerman, in and for Los Angeles County, California?

Mr. Stump: So stipulated as to all four policies.

Q. (By Mr. Castro): The notary public, Berenice D. Zimmerman, was also the lady that worked in your office, or was she another woman?

A. She works in the office.

Mr. Castro: I believe those are all the questions I have at this time, your Honor.

Mr. Stump: I have no further questions at this time.

The Court: That's all, then. You may step down.

(Witness excused.)

The Court: Call a short witness, if you can.

Mr. Stump: Mrs. Heysler. Well, I have changed my mind, your Honor. I think Mrs. Zimmerman will take only a few minutes. [57]

BERENICE ZIMMERMAN

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Berenice Zimmerman.

The Clerk: Will you spell your first name?

The Witness: B-e-r-e-n-i-c-e.

The Clerk: Thank you. You may sit down.

Direct Examination

By Mr. Stump:

Q. Mrs. Zimmerman, what is your occupation?

A. I am the office manager for Stivers Brothers.

Q. Are you also employed by Morgan A. Stivers as to his property? A. Yes.

Q. Do your duties involve the insurance on properties? A. Yes.

Q. Do you recall whether any insurance concerning the packing plant at Lindsay, California, was handled? A. I do.

(Testimony of Berenice Zimmerman.)

Q. Do you recall on or about some time in the fall of 1952, receiving a call from Truman B. Stivers or his office concerning that insurance?

A. On October 7, 1952, I received a telephone call [58] from Truman Stivers' office.

Q. Is it your policy, Mrs. Zimmerman, in the course of your duties, to keep a daily memorandum of your calls and the conversations? A. It is.

Q. Did you make such a memorandum on this occasion? A. I did.

Q. Do you have that memorandum with you?

A. I don't have with me now. I have it in your——

Q. Do you have any independent recollection of your telephone conversation at that time with Truman B. Stivers' office? A. Yes.

Q. You do recall it?

A. I do. I recall talking with their office?

Q. Yes. A. Yes, indeed.

Q. Will you tell the court what that conversation was?

Mr. Castro: May we find out who the other party to this conversation was?

Mr. Stump: I thought we had.

Q. With whom did you talk?

A. I talked with Mrs. Woods.

Q. Florence Woods Dines? A. Yes. [59]

Q. She was then Florence Woods?

A. Yes.

Q. Did she call you or did you call her?

A. She called me.

(Testimony of Berenice Zimmerman.)

Q. You recognized her voice on the phone?

A. Oh, yes. There was no mistake about who was calling.

Q. You talked to her quite frequently?

A. Yes, I did.

Q. Now, will you tell the court what the conversation was?

A. She told me with regard to placing the policies on the packing house, that in case of fire, since the plant was non-operating, that it would be necessary for us to put someone on the property, to live on the property, and for me to advise Mr. Morgan Stivers to that effect, and to let them know what he wanted to do about it, and also to let them know as to what distribution he wanted to make in the amounts of the policies.

Q. Was there anything further to that conversation at that time?

A. Yes. She also told me that because the plant was non-operating, that the rates on the insurance would be higher.

Q. Did you subsequently advise Morgan Stivers of that? [60]

A. When Mr. Stivers came in that evening—he was not in at the time the call came through to me—I gave him the memorandum. He always picks up the book when he comes in and takes his calls, and we discussed it, and later I advised her as to his decision as to what to do. He decided that a person would be——

(Testimony of Berenice Zimmerman.)

Q. You just tell us what you told Mrs. Woods.

A. Mrs. Woods?

Q. Yes, Mrs. Dines.

A. I told her what I am telling you, that I had talked to Mr. Stivers, and that the people would be put on the place, on the property, and that he wanted to place the insurance in the amount of \$40,000, total amount of \$40,000.

Q. And thereafter did you have any further conversation respecting this insurance at that time or until the policies were received?

A. I don't believe so.

Q. Did you in fact receive policies from Truman B. Stivers' office any time after that?

A. Yes, we did.

Q. Do you know what was done with those policies when they were received?

A. They were put in our files.

Q. Did you read them?

A. You mean word for word? [61]

Q. Yes. A. No, I did not.

Mr. Stump: I have no further questions.

The Court: May I ask, do you know whether or not there was an increased rate because this property was unoccupied?

The Witness: No. I don't believe the rate was actually increased, but I was advised that it would be increased, sir, because the property was non-operating at the time. I was advised by telephone, the talk with Mrs. Woods. That is shown on the record of the telephone call which I took.

(Testimony of Berenice Zimmerman.)

The Court: You say the rate was not increased?

The Witness: I don't believe it actually was, but I was advised that it would be.

The Court: All right.

Cross-Examination

By Mr. Castro:

Q. Isn't it a fact that what Mrs. Woods told you was that there would have to be a watchman on the property at all times?

A. Yes. She told me—that was the word she used, watchman at all times.

Q. Then did you tell that to Mr. Morgan A. Stivers, that there would have to be a watchman on the property at all times? [62]

A. Mr. Stivers read my note, sir, and we discussed it.

Q. Then did you call Mrs. Woods back and tell her Mr. Stivers would have a watchman at all times?

A. I called her back and told her he would meet whatever terms were necessary to be met in order for the insurance to be put in force.

Q. And did you have in mind at that time what she had told you, that there would have to be a watchman there at all times?

A. I beg your pardon?

Mr. Castro: Will you read the question?

(Question read.)

The Witness: I don't quite understand. Did I have in mind?

(Testimony of Berenice Zimmerman.)

Q. (By Mr. Castro): You stated that you—you testified that Mr. Stivers had told you that he would comply with all the terms of the policy.

A. Yes. That was his decision.

Q. Was that his decision after you told him there would have to be a watchman there at all times.

A. There would have to be someone on the property at all times.

Q. Did you use the term “watchman”?

A. To be very honest, I couldn’t say. It has been three years since I had the conversation. [63]

Q. Did you write the words down?

A. I wrote the word “Watchman,” yes.

Q. I show you this memorandum book which you have.

A. I am familiar with that.

Q. You have refreshed your memory from it and it uses the term “watchman,” does it not?

A. Yes.

Q. That term “watchman” is in your own handwriting?

A. That is true.

Q. Then that is what you told Mr. Morgan A. Stivers, a watchman would be required, and so on?

A. Yes. It is in the notes.

Q. That is what you had in mind when you told Mrs. Woods, when you talked to her in the second telephone conversation, that Mr. Stivers would comply with all the terms of the policy?

Mr. Stump: I will object to that question, your Honor, on the ground I don’t believe, I may be wrong, that she testified she told Mrs. Woods that

(Testimony of Berenice Zimmerman.)

Stivers would comply with all the terms of the policy. I believe that assumes a fact not in evidence.

Mr. Castro: I would like to have the reporter read it back.

The Court: She has testified that, that he would do whatever was necessary to comply with the terms of the policy, [64] to have insurance.

The Witness: The requirements were that there would be someone living on the property and we were advised that the rates would be higher——

Mr. Castro: I move to strike that as not responsive. That was not the question. Your Honor asked her if she hadn't made the statement.

The Court: I know, but everybody is not as experienced as we are. Let her tell her story. Everybody can't be an expert witness, you know, counsel.

Mr. Castro: I know that, your Honor. Sometimes we get on a broken record routine, you know.

Q. Mrs. Zimmerman, after you received the authorization from Mr. Morgan A. Stivers to proceed with the insurance with Truman B. Stivers' agency, you telephoned Mrs. Woods back? A. Yes.

Q. You have known her for a number of years, have you? A. Yes.

Q. About how long?

A. Possibly 10 years.

Q. How long have you worked with the Stivers Brothers concern?

A. Worked with Morgan Stivers Brothers concern?

(Testimony of Berenice Zimmerman.)

Q. Yes. [65]

A. In what way do you mean, worked?

Q. As I understand, you are employed at the present time, are you, by the Stivers Brothers?

A. Yes, Stivers Brothers.

Q. You were employed back in October, 1952, by the Stivers Brothers? A. That is true.

Q. As I understand it, that is a partnership between Morgan A. Stivers and Howard Stivers and possibly some other members of the family?

A. Just Morgan and Howard.

Q. How long have you worked in regard to the Stivers Brothers? A. Since April 15, 1945.

Mr. Castro: That's all the questions I have, your Honor.

The Court: That's all.

(Witness excused.)

The Court: We will take a recess until 2:00 o'clock. This witness may be excused?

Mr. Castro: Yes, your Honor.

Mr. Stump: Yes, your Honor.

The Court: We will take our recess now.

(Thereupon, a recess was taken to 2:00 o'clock, p.m.) [66]

Tuesday, February 21, 1956, 2:00 P.M.

The Court: You may proceed.

Mr. Stump: At this time, your Honor, we will call Clara M. Heysler.

CLARA M. HEYSLER

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Clara M. Heysler.

Direct Examination

By Mr. Stump:

Q. Mrs. Heysler, what is your occupation?

A. Well, I am a bookkeeper.

Q. And have you had occasion to be employed by Truman B. Stivers? A. Yes.

Q. How long have you been employed by him?

A. Well, since 1949, part time.

Q. And were you so employed by him on or about—during the fall of 1952? A. Yes.

Q. What are your duties there, Mrs. Heysler?

A. Well, I do any clerical duties. I take care of insurance and other clerical work that comes [67] up.

Q. And what do you do with particular reference to insurance?

A. Well, when policies come up for renewal I order the new policies and anything pertaining to it.

Q. Do you have any recollection of policies for Morgan A. Stivers on a packing plant in Lindsay, California, coming up for renewal during any period? A. Yes, I do.

Q. Now, will you tell the court what you know about that?

(Testimony of Clara M. Heysler.)

A. Well, we pull our expiration files about 60 days prior to when a policy is about to expire and then proceed—we find out first if the insured wishes it to be renewed and then we proceed to call the companies and renew it if we can.

Q. With particular reference to the packing plant or house were you instructed by your employer or anyone in his employ to attempt to renew those policies? A. Yes, I was.

Q. Who so instructed you?

A. Mr. Stivers.

Q. Truman B. Stivers?

A. Truman B. Stivers and his assistant, Mrs. Woods.

Q. Mrs. Woods Dines? A. Yes.

Q. Now, what did you do in pursuance of those instructions? [68]

A. Well, they told me to call various companies and see if they would carry it and at what rates.

Q. And what companies did you call?

A. Well, the first company I called was the National American.

Q. And whom did you call there, if you know?

A. I think it was a man by the name of Mr. Weingarten. He was the rate clerk there and he was the one I usually talked to, but I couldn't be quite sure that he was the one I talked to.

Q. Now, when you called him were you calling to place an application for insurance?

A. No, only to get rates.

Q. And were you given rates?

(Testimony of Clara M. Heysler.)

A. Yes.

Q. Do you recall the conversation you had with Mr. Weingarten at that time?

A. Well, nothing specially except that I described the plant to him and how much coverage we wanted.

Q. When you described the plant what did you tell him?

A. I told him it was a packing house and the buildings that were on it, a loading platform and so forth.

Q. Was that all that you said about the subject premises to him? [69]

A. Well, now, that I can't recall. I told him everything he asked me but exactly what that was I can't say for sure.

Q. Did he ask you if it was occupied?

A. Well, that I don't recall.

Q. You don't recall that he did?

A. Not with that particular company. He may have later, you know, when I ordered it but we were only getting rates at that time.

Q. Now, did you call anyone just for the purpose of obtaining rates after you talked to Mr. Weingarten at National American? A. No.

Q. Then what did you do in reference to these policies?

A. Well then, I called a company which had been carrying it previously. Their policy was about to expire. I called them to find out how much they would take.

(Testimony of Clara M. Heysler.)

Q. What company was that? Was it in the Loyalty Group? A. Girard, I think.

Q. And whom did you call at the Girard Insurance Company on that date?

A. Miss Ward I think was the name of the girl that took the orders.

Q. Do you recall the conversation you had with Miss Ward at that time? [70]

A. Well, not in detail I don't.

Q. Do you know what she asked you?

A. I gave her the number of the expiring policy and of course she would look that up—that would have the date on it.

Q. Well now, what next did you do in reference to these policies, Mrs. Heysler?

A. Well, these two companies said they—each one would only take \$10,000. We wanted \$40,000 and they would each take \$10,000, so we had to find a company that would take the rest of it.

Mr. Ray McMillan had two policies that were expiring so naturally we called him to see if his companies would renew.

Q. And whom did you talk to at McMillan's office? A. Mr. McMillan.

Q. And did you talk to him before on the phone?

A. No, never.

Q. Then how do you know that you talked to Mr. McMillan?

A. Well, he said he was Mr. McMillan and I presumed he was telling me the truth.

(Testimony of Clara M. Heysler.)

Q. You had his telephone number out of the telephone book; is that it?

A. Well, out of the phone book. We may have had it on the slip that showed the policies were expiring. You see [71] this was one of the slips we pull.

Q. And you called that number? A. Yes.

Q. And the party who answered said he was Mr. McMillan?

A. Yes, he said he was Mr. McMillan.

Q. Now, do you recall what conversation you had with Mr. McMillan?

A. Well, I told him the policies were expiring and I gave him the numbers and if they—I told him about the companies and if they asked him would he renew and after some conversation he asked me various questions about them. He asked me if they were operating and I didn't know because I didn't know anything about the plant myself, so Mr. Neil Stivers was in the back office. He happened to be there and I knew he would know, so I told Mr. McMillan to wait on the phone and I would find out.

So, I went back and asked Mr. Neil Stivers if the plant was operating and he said no, and he followed me out to the front office where I was phoning from and stood there while I talked to Mr. McMillan.

I told Mr. McMillan that it wasn't operating at this time but then Mr. Stivers told me that they would—they were putting a man in there—that

(Testimony of Clara M. Heysler.)

there was living quarters right behind the plant and he was putting in a man so they could more or less keep his eye on it at all times. [72]

Q. Did you tell Mr. McMillan that?

A. I told Mr. McMillan that.

Q. Then what did he say to you, if anything?

A. Well, he said he would look into it and find out if the companies would renew and for how much and I think that was all the conversation we had at that time.

Q. Now, subsequent to that time did you call any or all of these companies about actually writing the coverage for this plant?

A. Yes. I called National American. I can't recall the dates or the exact conversation but he told me——

Q. That was prior to December 1, 1952?

A. Oh, yes. And he told me that they would renew in the sum of \$10,000 but that was all they were willing to take.

Q. Now, did you submit any written instrument to National American?

A. Well, I think we put in an order blank. It wasn't in detail. Just told him to renew on the packing plant.

Q. And when did you submit that?

A. Well, I couldn't give you the date.

Q. Was it before or after your second conversation by telephone with National American?

A. Well, it must have been after. I am not sure

(Testimony of Clara M. Heysler.)

of this. It must have been after because I told him to renew and he did and we got the policy. [73]

Q. Did you have your policies before you sent in this written statement?

A. No, I don't think so because I sent it as soon as he said he would take it. I just made out this little order and mailed it to him.

Q. Was that more or less a confirmation of the telephone call?

A. It was a confirmation. That is what you would call it.

Q. Now, did you talk to any other company besides National American?

A. Well, I called the Loyalty Group and told them.

Q. Well, before you say what you told them will you tell us with whom you talked at that time?

A. Now, I can't recall.

Q. You don't recall the name?

A. Well, I presume it was Miss Ward.

The Court: We don't care what you presume. If you don't know you don't know.

The Witness: Well, I don't know.

Q. (By Mr. Stump): Do you have any recollection of calling the usual number that you called in that regard? A. Yes.

Mr. Castro: That is leading and suggestive.

Mr. Stump: Well, I think she has shown her memory needs [74] refreshing, your Honor.

The Court: I will ask the question. Did you call the same number you called before?

(Testimony of Clara M. Heysler.)

The Witness: Yes, I did.

Q. (By Mr. Stump): And do you recall the conversation at that time, Mrs. Heysler?

A. Well, I don't recall it. I can give you the gist of it. I couldn't tell you the exact words.

Q. You don't remember the exact words?

A. No, I don't.

Q. Well, tell us to the best of your recollection what was said.

A. I told him it was the same packing plant they carried the insurance on and we were simply renewing it under the same conditions as far as I knew.

Q. This was with the Girard Company?

A. That was with Girard. We called it the Loyalty Group.

Q. You remember nothing further in that conversation?

A. No, I don't—not anything special. I may have called them several times but it has been quite a while ago and I don't remember.

Q. In any of these conversations with the office with whom you placed insurance, with Girard, did you discuss the plant's operations or [75] operating?

A. I did discuss it with Mr. McMillan.

Q. I am talking about——

A. The others I think I did but as I say it has been a long time and I can't recall the words I said, but if they asked me I told them.

Q. But you have no definite recollection?

(Testimony of Clara M. Heysler.)

A. No, I don't.

Q. Now, other than—strike that.

Now, coming again to Mr. McMillan and the policies with Queen and Pennsylvania State Insurance Company, was it necessary for you to call him after this conversation you have testified to, to request him to actually issue those policies?

A. Yes, I called him the second time.

Q. You called him the second time?

A. He called us back and said what he could get. You see we had the \$20,000 then and he said that he could get \$20,000 more so we told him to place it.

Q. And this second conversation, was that the extent of the conversation or was there a further discussion about it?

A. Well, I don't know. I don't know whether we discussed it further than that. Of course he had all the details at that time.

Q. You have no independent recollection of anything further in your conversation? [76]

A. No, I don't. The description of the plant was on his old policy. I didn't have to give him that. He had it all.

Q. And subsequent to that at any time did policies from Mr. McMillan's office come into your office?

A. Yes, they did.

Q. And they were from what companies?

A. Well, the Queen and then a new company. He didn't renew one of them. He got a new policy from another company. I think it was the Institute of

(Testimony of Clara M. Heysler.)

Pennsylvania, or something, Insurance Company of Pennsylvania, I guess.

Q. And what happened to those policies if you know?

A. Well, they were processed and the bills rendered and the policies were mailed to Mr. Morgan Stivers.

Q. Do you know whether all four policies were mailed to Mr. Stivers in the same envelope and at the same time?

A. That I don't know. They may not have come in on the same dates. You see different companies may not have the same mailing dates.

Mr. Stump: I think we have no further questions. You remain there, Mrs. Heysler.

Cross-Examination

By Mr. Castro:

Q. Mrs. Heysler, you stated that about 60 days before the expiration dates of these policies in 1952, you called [77] the National American Insurance Company?

A. Well, I don't know the dates but it was during the month of October.

Q. 1952? A. Yes.

Q. And you called, you say, the National American to renew their policies?

A. They had no policy. I called them to find out what rate they would issue us one at and how much they would take.

Q. Then it is correct, is it not, that the National

(Testimony of Clara M. Heysler.)

American Insurance Company did not have an insurance policy on this risk prior to December of 1952? A. That is correct.

Q. And anything you may have said to the contrary concerning a renewal policy by the National American Insurance Company was a mistake on your part?

A. That was not a renewal. We didn't call them for a renewal. We called them for rates in the beginning.

Q. And your use of the word "renewal" in your answers to Mr.——

A. Well, the renewals were the Loyalty Group and the Queen.

Q. Will you please let me finish my question?

A. Okay.

Q. The use of the word "renewal" so far as the National [78] American in answering Mr. Stump's question was an error because there was no renewal policy for the National American?

A. No, there wasn't.

Q. Now, your conversations with Mr. McMillan—you stated that he told you he could get you an additional \$20,000 worth of insurance?

A. Well, he didn't tell me in the beginning. He told me he would find out and then call us back and let us know if he could or not.

Q. Isn't it a fact Mr. McMillan did not obtain an additional \$20,000 in insurance for you at any time with regard to this risk?

A. I didn't understand your question.

(Testimony of Clara M. Heysler.)

Q. Well, isn't it a fact that the insurance that Mr. McMillan had gotten on this—do you have some notes?

A. Well, he placed \$12,500 with Queen and \$7,500 with the Insurance Company of Pennsylvania. That is \$20,000.

Q. How much did the Insurance Company of Pennsylvania have prior to December, 1952?

A. They had none—they had none.

Q. Isn't it a fact they had \$7,500 prior to December of 1952?

A. He was carrying it with another company.

Q. Isn't it a fact that the Insurance Company of Pennsylvania was a renewal policy? [79]

A. No, it was not.

Q. Now, with reference to the Queen Insurance Company, prior to December of 1952, didn't it have \$11,100 coverage?

A. Well, I don't remember exactly.

Q. You have some notes there. Do you have some notes? A. No, I don't have the notes.

Q. What did you take out of your purse and look at a few minutes ago?

A. This is what he agreed for the new, the policies in 1952. This had nothing to do with the old policies that were expiring.

Q. May I see what you have there?

A. Why, surely.

(Handing document to counsel.)

Mr. Stump: I have seen them, counsel.

(Testimony of Clara M. Heysler.)

Q. (By Mr. Castro): Referring to the documents that you have handed me, may I have these marked for identification, your Honor?

The Court: Yes.

The Clerk: Defendants' Exhibit A for identification.

(The exhibit referred to was marked Defendants' Exhibit A for identification.)

Q. (By Mr. Castro): The first sheet on Exhibit A is in handwriting, part pencil and part ink. Is that in your handwriting? [80] A. Yes.

Q. The second sheet is in handwriting, partly pencil and partly ink. Is that in your handwriting?

A. I think so.

Q. Is there some question about it?

A. Well, I think I wrote that.

Q. There is another sheet in handwriting. Is that in your handwriting?

A. Yes, that is my handwriting.

Q. And the next sheet in pencil handwriting. Is that in your handwriting?

A. Yes, that is my handwriting.

Q. And the note attached to that exhibit, is the handwriting there yours?

A. Yes, that is mine.

Q. Now, in October of 1952, didn't Mr. McMillan have two policies covering this risk?

A. Yes, he had two.

Q. And they were with the Queen Insurance

(Testimony of Clara M. Heysler.)

Company and with the Insurance Company of the State of Pennsylvania, were they not?

A. No, not the old one. It was Fulton, I think.

Q. Did you have a policy with the Travelers Insurance Company? A. No. [81]

Q. Now, did you fill out a written application to anybody for fire insurance on these premises?

A. I think it is typewritten.

Q. And to whom did you fill it out?

A. Well, I think to the National American and Loyalty Group.

Q. Attached to Exhibit A is a carbon copy of an application for fire insurance. A. Yes.

Q. Is that the one that you filled out?

A. Yes.

Q. And you filled out that application——

A. You see there it says “renewal of policy 102.” That would be the Loyalty Group.

Q. And that would be the Girard Insurance Company? A. Girard, yes.

Mr. Castro: I would like to remove this document from the exhibit for identification, and mark it as defendants’ exhibit first in order.

Mr. Stump: No objection.

The Clerk: Defendants’ Exhibit B for identification.

Q. (By Mr. Castro): Now, did you file a written application with anybody else?

A. No, I don’t think so.

Q. Didn’t you file a written application with the [82] National American Insurance Company?

(Testimony of Clara M. Heysler.)

A. Yes, National American Insurance Company and the Loyalty Group.

Q. And do you have a copy of that application?

A. It is there, I think, attached to that—I am not sure.

Q. Is that the one on the letterhead of H. F. Ahmanson?

A. Yes, that is the National American.

Q. And you filled that one out? A. Yes.

Mr. Castro: I would like to offer it in evidence as defendants' next in order.

Mr. Stump: No objection.

The Clerk: Defendants' Exhibit C in evidence.

(The exhibit referred to, marked Defendants' Exhibit C, was received in evidence.)

Q. (By Mr. Castro): Now, did you file any other written applications?

A. I don't recall any.

Q. In neither of those applications did you state that the premises were not in operation—were not occupied, did you?

The Court: The applications speak for themselves, counsel.

Q. (By Mr. Castro): Did you make any memorandum of any [83] conversation you had with Mr. McMillan? A. Well, I may have made notes.

Q. Do you have any record of those notes?

A. Only what you have there. These were the notes I made while Mr. Neil Stivers gave me—when I had the first conversation, when he asked me—you

(Testimony of Clara M. Heysler.)

see, I put here “going to put Ahmanson in.” When he asked me if it was in operation I asked Mr. Neil Stivers and I had this with me and I wrote on here as he told me to—“going to put Ahmanson in,” and to go back—to give this to—this information to Mr. McMillan and that was done at the time of the conversation while I had him on the phone.

Q. Now, did you make that in regard to the Girard renewals?

A. No, no. This was when I was talking to Mr. McMillan. I had these slips all made out for the various companies ahead of time and I may have had the whole bunch in my hand while I talked to him, but that I was—you see, he gave me this information “open platform driveway between” and I wouldn’t have known that.

Q. And those are all the notes you made at the time you talked to Mr. McMillan?

A. Well, that is all I have with me. There may be other memoranda.

Q. Did Mr. McMillan have anything to do with the Girard [84] Insurance Company?

A. Nothing to do with Girard as far as I know.

Q. Now, did you write any letters to Mr. McMillan?

A. No, not that I recall.

Q. I understand there were some letters written—

Mr. Castro: Mr. McMillan is outside as a witness, your Honor. Could I have Mr. McMillan called in and ask him for those letters at this time?

(Testimony of Clara M. Heysler.)

The Court: Yes, you may get them.

Mr. Castro: At this time, your Honor, we will offer in evidence a letter dated October 7, 1952, on the letterhead of Truman B. Stivers, addressed to Roy A. McMillan "re Stivers Packing Company, Truman B. Stivers by F. E. Woods" as defendants' next in order.

The Clerk: Defendants' Exhibit D.

(The exhibit referred to marked Defendants' Exhibit D, was received in evidence.)

Mr. Castro: And a letter dated January 23, 1953, on the letterhead of Truman B. Stivers, addressed to the same person, Roy A. McMillan, bearing the signature "Truman B. Stivers by Florence E. Woods" as defendants' exhibit next in order.

The Clerk: E.

(The exhibit referred to, marked Defendants' Exhibit E, was received in evidence.)

Q. (By Mr. Castro): You say that at the time you talked [85] to Mr. McMillan in the telephone conversation that Mr. Stivers had told you, Mr. Neil Stivers had told you that the plant was not then in operation? A. Yes.

Q. Did he tell you anything about whether it would be permanently out of operation or whether or not that was temporary?

A. He didn't tell me. He just said it was not being operated.

Q. Did you tell Mr. McMillan that Mr. Stivers

(Testimony of Clara M. Heysler.)

would keep his eye on the property at all times?

A. No, I didn't tell him that. I said that they were putting a man in that company right back of the plant who would live there—there was living quarters back there.

Q. Didn't you use the phrase "keep his eye on it at all times"?

A. Well, I don't recall that particular remark.

Q. After this loss occurred did you give a written statement to anybody concerning this loss?

A. Well, I think I wrote up a statement as near as I could recollect of just what happened.

Q. And to whom did you give that written statement? A. I gave it to Mr. Stivers.

Q. Truman B. Stivers? A. Yes. [86]

Q. I will show you a copy of a statement dated February 22, 1955. Does it bear your signature?

A. Yes.

Q. And is that the statement which you wrote up?

A. It is a statement, yes. This is the statement I signed. I didn't type it up but I signed it.

Q. Did somebody dictate that for you?

A. No. I wrote it of my own volition.

Q. No one representing any of the defendants in this case asked you to make the statement?

A. He asked me to write up as near as I could remember just what happened and I did. That is as much as I can remember about it.

Q. And in that statement did you say——

(Testimony of Clara M. Heysler.)

The Court: Doesn't the statement speak for itself, counsel?

Mr. Castro: I will offer it in evidence as defendants' exhibit next in order.

The Clerk: Exhibit F.

(The exhibit referred to, marked Defendants' Exhibit F, was received in evidence.)

Q. (By Mr. Castro): The policies which were issued by the defendants in this case——

The Court: There is no dispute about the policies being issued. Why waste time on that? [87]

Mr. Castro: I wanted to be sure she was the one who signed Mr. Truman B. Stivers' name. The other lady said she thought this lady had done it and there is an initial under his name. Perhaps she can identify it. (Handing document to the witness.)

The Witness: Yes, I signed that. That is my handwriting.

Q. (By Mr. Castro): And what is your initial there?

A. "H." That is supposed to be an "H."

Q. The initial "H" under Truman B. Stivers' name, where it appears on these policies would represent your initials?

A. Yes, that I wrote it and put his name and put my initial on it.

Mr. Castro: I believe those are all the questions I have, your Honor.

Mr. Stump: We have no further questions of Mrs. Heysler.

(Testimony of Clara M. Heysler.)

We would like to call at this time Truman B. Stivers as a witness.

The Court: May this witness be excused?

Mr. Castro: Yes.

Mr. Stump: Yes.

(Witness excused.)

TRUMAN B. STIVERS

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name. [88]

The Witness: Truman Bailey Stivers.

Direct Examination

By Mr. Stump:

Q. Mr. Stivers, what is your occupation?

A. I am an insurance agent.

Q. And are you licensed in the State of California?

A. I am.

Q. How long have you been so licensed to transact insurance business?

A. Since 1948.

Q. And what companies do you represent?

A. Do you desire all of the companies I represent? I represent the Loyalty Group at the present time and in the Loyalty Group there is the Firemen's Insurance Company and the Commercial Casualty Company.

I did represent the Girard Insurance Company in the Loyalty Group, too, but at the present time I do not.

(Testimony of Truman B. Stivers.)

Q. Did you represent the Girard on or about December of 1949? A. Yes, I did.

Q. And did you represent them on or about December of 1952? A. Yes, I did.

Q. And did you have occasion to write through Girard Insurance Company policies of insurance on the packing plant [89] at Lindsay, California?

A. I did.

Q. Now, you represent the National American Insurance Company? A. Yes.

Q. And at what times have you represented them? A. At what times?

Q. Yes, when did you commence representing them and are you still representing them?

A. 1952 and I am still representing them.

Q. You were representing them on or about December 1st of 1952? A. Yes.

Q. Now, as regards the National American Insurance Company did you receive any written authorization from them to represent them?

A. Yes. I received a letter from the company authorizing me to act as their agent without limitation.

Q. Mr. Stivers, I will show you a——

Mr. Castro: I will ask this be marked for identification first.

The Court: Go ahead and show it to him.

Q. (By Mr. Stump): I show you a letter dated December 13, 1951, signed by Davis S. Hannah on the letterhead of H. F. Ahmanson & Company, managers American Life Insurance Company. [90] Is that the letter you received?

(Testimony of Truman B. Stivers.)

A. Yes, that is the letter.

Q. That was your appointment as their agent, is that correct? A. Yes.

Mr. Stump: At this time we offer this as plaintiff's next in order.

The Court: Received.

The Clerk: Plaintiff's Exhibit 5 in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 5, was received in evidence.)

Q. (By Mr. Stump): Now, as regards the Loyalty Group and particularly the Girard Company of the Loyalty Group, Mr. Stivers, did you receive a contract, an agency agreement from that organization? A. Yes, I did.

Q. And I show you here what purports to be an agency agreement under date of September 16, 1948, between yourself as agent and the Girard Fire & Marine Insurance Company as principals. Is that the contract? A. Yes, that is the contract.

Q. That you received? A. Yes.

Mr. Stump: We offer this as Plaintiff's Exhibit 6 in evidence. [91]

(The exhibit referred to, marked Plaintiff's Exhibit 6, was received in evidence.)

Q. (By Mr. Stump): Now, at the time of issuing these policies on December 1st, 1952, covering the packing plant, were you operating under these instructions which have been shown you from the

(Testimony of Truman B. Stivers.)

National American and Girard Insurance Company? A. I was.

Q. Now, Mr. Stivers, in the process of operating as an insurance agent did you countersign policies?

A. Oh, yes.

Q. And endorsements? A. Yes.

Q. Did you have a supply of endorsements in your office? A. Yes.

Q. Did you execute endorsements?

A. Yes.

Q. Without reference to the company?

A. That is correct.

Q. Before execution? A. That is right.

Q. And did you maintain blank insurance forms or policy forms in your office?

A. No, I did not because it was more convenient to telephone the company and have them type the policies. [92]

Q. Was there some special arrangement between these companies and you in regard to that matter?

A. No special arrangement. It was just convenient to pick up the phone and call the companies and their office force would type the policy for us. It was just a matter of convenience.

Q. Do I understand you to state that your authority was then to prepare the policies yourself?

A. I beg your pardon?

Q. Do I understand you to state your authority was to prepare the policies yourself?

A. I believe I had that authority although I never actually prepared the policies.

(Testimony of Truman B. Stivers.)

Q. It was a matter of convenience that you did not prepare the policies? A. That is correct.

Q. Have you written other insurance for Morgan A. Stivers?

A. Oh, I have written a very large amount of insurance for Mr. Stivers—over \$4,000,000, I believe.

Q. Have you ever at any time been requested to issue insurance by Morgan Stivers and advised him at that time that he was insured from that moment on? A. Yes, many times.

Q. Now, as to the application for these particular [93] insurance policies Mr. Stivers, with Girard and National American, did you personally take the application for their issuance yourself?

A. Me personally, no.

Q. Who in your office did take the application?

A. Either Mrs. Heysler or Mrs. Dines.

Q. Do you recall the instance that either one of those persons discussed with you the expiration of the then existing policies and the issuing of new policies? A. Yes, they did.

Q. Do you recall which one spoke to you about it?

A. I believe Mrs. Dines brought it to my attention and then Mrs. Heysler contacted the insurance companies over the phone to obtain the rates and to see about the actual placing of the policy.

Q. Now, were you provided a rate back by these companies? A. Yes.

Q. And in writing insurance you applied the rate to the risk, is that correct?

(Testimony of Truman B. Stivers.)

A. That is correct.

Q. Did you instruct either Mrs. Heysler or Mrs. Dines to call the National American or Girard to ascertain rates? A. Yes, I did.

Q. Was there any reason for that? [94]

A. Well, the National American is a deviating company and their rates are sometimes less than other companies and it is our policy to obtain the most reasonable rate for the best coverage for our client, so in the process of obtaining this insurance we naturally would call their company and we would find the rates and give the best insurance for the best rate possible.

Q. You testified, did you not, that you had a rate book for these companies?

A. That is correct.

Q. But you would, nonetheless call to obtain the rate?

A. Yes. We would look in our rate book but we would also always call the companies to ascertain that we were correct rather than have an embarrassing situation later when a mistake might be found.

Q. You called to verify the rate was correct?

A. That is right. The rates change quite often—every day. We have an envelope full of—maybe not every day but quite often. We have an envelope full of rate changes in our mail and it is quite a job to keep it properly filed so that there is absolutely no chance of mistake. So, we usually call the company to ascertain that our rates are correct before we actually quote them.

(Testimony of Truman B. Stivers.)

Q. Now, in your insurance dealings with Morgan Stivers did he submit written applications to you for these policies? [95]

A. No, no written application.

Q. Were you asked to obtain insurance on the packing plant prior to December 1st, 1952?

A. Yes.

Q. Had you obtained insurance?

A. We obtained insurance on the packing house in 1949, I believe.

Q. Was that the first time that you issued policies covering the packing plant?

A. Yes, that was the first time.

Q. At that time was a written application made to you by Morgan A. Stivers for insurance?

A. No, no. It was oral.

Q. Do you recall the circumstances of that application?

A. The exact circumstances I do not recall.

Q. Now, at no time then, your testimony is, did you receive a written application for insurance from Morgan A. Stivers either in 1949 or in 1952?

A. That is correct.

Q. Are you acquainted with the packing house located at Side Station? A. Yes.

Q. When did you first learn of that—those particular premises, Mr. Stivers?

A. I believe they began to operate the packing house [96] when I was in the Army and on one of my leaves I visited the packing house back during the war years.

(Testimony of Truman B. Stivers.)

Q. That was prior to 1949?

A. Oh, yes. It was 1943 or 1944.

Q. Was the packing plant operating at that time? A. It was.

Q. What is the earliest time, to your knowledge if at all, did you know that of your own knowledge that the packing plant was not operating?

A. The packing house was actually not operating?

Q. Yes.

A. It was sometime after I wrote the first policy that I know of my own knowledge that it was not operating.

Q. How long a time?

A. I would say less than a year—within the year.

Q. What if anything——

The Court: You mean the policies of which these were renewals?

The Witness: Yes, the first policies.

Q. (By Mr. Stump): At the time that you were requested to renew these policies or to issue policies in 1952, did you know that the plant was not operating? A. Oh, yes, yes, I knew it was vacant.

Q. Of your own knowledge how long prior to that time did you know the plant had not been operating? [97]

A. Well, I knew that the plant had not been operating since approximately 1950.

Q. And had you had any occasion after writing the first policies and between that time and renewing the second policies to discuss with Morgan

(Testimony of Truman B. Stivers.)

Stivers or any representative of his, the fact that this plant was not occupied?

A. Yes. I am inclined to say quite often on business of my own. We have ranches there and I would make it a point to drive by the packing house to see that things were in order and on occasion I found that the people that were living in the plant, occupying it, had moved and I would bring this to the attention of Morgan Stivers and then he would see that somebody would be located in the property.

Q. And that was prior to issuing these second policies, is that right? A. Yes, sir.

Q. And you knew for several years prior to issuing the second policies, the policies in 1952, that the plant had not been operated as such?

A. I knew it for more than a year, yes.

Q. And did you at any time have a conversation with Mr. Stivers regarding the necessity for having someone living on the premises in lieu of occupancy? A. Yes, I did.

Q. Can you recall what you told Mr. Stivers at that [98] time?

A. The exact words, no, but the conversation was to the effect that unless he would keep somebody on the property his insurance would be in jeopardy—if it were vacant for a certain length of time he would be putting his insurance in jeopardy and he should try and keep somebody in there living on the premises.

Q. Did you at any time tell him his insurance

(Testimony of Truman B. Stivers.)

was in jeopardy because he was not operating the plant?

A. No. I thought that "occupancy" was people actually, physically living on the premises.

Q. Now, did you tell Mr. Stivers that at any time?

A. Well, I told him that if he would keep somebody living on the premises his insurance would be all right.

Q. And you told him that before these policies issued in December of 1952? A. Yes.

Q. And did you ever tell him that after that?

A. I believe so.

Q. And do you recall—strike that.

Now, did you have any conversations with Mr. McMillan at any time, the agent for Queen and State of Pennsylvania?

A. I possibly had a conversation with him back in 1949. It has been so long I really don't recall.

Q. Of your own knowledge do you know whether you asked [99] Mr. McMillan to issue or to write policies respecting the packing plant premises?

A. I did through Mr. Baker, special agent for the Loyalty Group in Pasadena. I asked Mr. Baker where we could place the rest of the insurance that Mr. Morgan Stivers desired on his packing house inasmuch as my companies were only willing to accept the maximum of \$20,000.

Q. Did you ever have any conversation with Mr. Baker respecting the issuance of these policies in relation to the operations of the packing plant?

(Testimony of Truman B. Stivers.)

A. No.

Q. Now, do you know what transpired in your office at the time of the renewal of the policies in 1952 in regard to conversations with Morgan Stivers? A. I know a little bit on it, yes.

Q. Will you tell the court what you know of your own knowledge?

Mr. Castro: Just a moment. I object to that as uncertain and nobody has testified previously concerning conversations out of that office who ever placed Truman B. Stivers present at any such conversation.

Mr. Stump: I will make the question more specific, more definite, your Honor.

I believe Mr. Stivers has testified that he talked to Mrs. Dines and Mrs. Heysler, but I will ask that question. [100]

Q. (By Mr. Stump): Did you have any conversation with either Mrs. Heysler or Mrs. Dines respecting the issuance of policies on the packing plant in 1952? A. Yes.

Q. What did you—with whom did you have a conversation? Did you have a conversation with Mrs. Dines? A. Yes.

Q. What did you—what was your conversation with her in that regard?

The Court: What materiality would that be, counsel? They have testified as to the conversations. You might ask the witness whether they were authorized to act for him or whether they were not.

The Witness: Yes, they were.

(Testimony of Truman B. Stivers.)

Mr. Stump: That was the only purpose I had in mind. My only purpose was to show that they were carrying out his orders to a certain extent.

The Court: There is no question about that is there, counsel?

Mr. Castro: I don't think so, your Honor.

Q. (By Mr. Stump): Did you at any time see the policies of insurance that were issued to Mr. Morgan Stivers when they were returned from Girard and National American?

A. I might have but it is the girls—the girls usually just take care of mailing the policies down to the [101] client.

They have authorization to countersign it and initial it and it is a matter of detail.

Q. (By Mr. Stump): You have no recollection of having personally seen those policies?

A. No.

The Court: You were familiar with the California form of policies, weren't you?

The Witness: Yes, sir.

The Court: You knew the terms and conditions of them?

The Witness: Yes.

The Court: And didn't you also know that you didn't have any authority to deviate from the form?

The Witness: I didn't think I was deviating from it.

Q. (By Mr. Stump): Mr. Stivers, did you keep the standard watchman form of endorsement—a supply of those in your office?

(Testimony of Truman B. Stivers.)

A. I don't believe we have any of those.

Q. Did you at any time prepare a standard form of watchman endorsement with these policies?

A. No.

Q. Did you know at the time—strike that.

Did you request Mrs. Heysler or Mrs. Dines to prepare a standard form of watchman endorsement for the policies? A. No, no. [102]

Q. You testified, did you not, that you did not think that such a form was necessary, is that correct?

A. Well, I was sure it wasn't—or my understanding was in order to have a watchman endorsement, in order to have the rate decreased on a policy, you have to actually have a watchman there—that is there at all times and punching a time clock and show evidence that he is there and making certain rounds and I knew that was impossible—that all that they were going to have there was somebody occupying the premises.

Mr. Stump: Your Honor, at this time a representative of the Farmers & Merchants Bank is here. If we could interrupt this witness for just a moment and put him on we could then release him. Is that agreeable?

Mr. Castro: Yes.

The Court: You may step down for a moment. You need not leave the courtroom.

Mr. Stump: May I suggest if we could have the 3:00 o'clock recess a little bit early we could go over this and perhaps counsel and I can stipulate as to it.

The Court: We will take a five-minute recess at this time. It is nearly time for the recess anyway.

(Short recess.) [103]

Mr. Stump: At this time I would like to call Mr. Herrold of the Farmers & Merchants Bank, Long Beach, California. Mr. Herrold, will you take the stand, please?

CHARLES HERROLD

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name?

The Witness: Charles Herrold.

The Clerk: How do you spell your last name?

The Witness: H-e-r-r-o-l-d.

Mr. Stump: At this time, your Honor, the plaintiff offers to prove by Mr. Herrold that the writings on these policies signed by O. E. Wesenberg were in fact signed by him and that he is the vice president of Farmers & Merchants Bank, and a director of that bank. Mr. Wesenberg himself was subpoenaed to appear here, but he sent this messenger from the bank instead. If counsel doesn't feel this is adequate, we will then prepare to have Mr. Wesenberg here, but at this time, if this is sufficient, we will proceed on that.

Direct Examination

By Mr. Stump:

Q. Mr. Herrold, what is your occupation?

A. Credit manager.

(Testimony of Charles Herrold.)

Q. Where are you employed? [104]

A. Farmers & Merchants Bank.

Q. In Long Beach, California? A. Right.

Q. Do you know O. E. Wesenberg of the Farmers & Merchants Bank? A. I do.

Q. What is his capacity in the bank?

A. Vice president.

Q. Are you familiar—

The Court: Just a minute. Does this witness know whether or not his people have any mortgage on the property involved here?

The Witness: I do not.

The Court: You don't know of your own knowledge?

The Witness: Not to my knowledge.

Q. (By Mr. Stump): Do you know Mr. Wesenberg's signature? A. I am sure I do.

Q. I show you here what purports to be a writing signed by Mr. O. E. Wesenberg. Is that Mr. Wesenberg's signature?

A. It appears to me that it is.

Q. And this is Plaintiff's Exhibit No. 2 that I have just shown you. I show you here Plaintiff's Exhibit No. 3, a writing purporting to be signed by O. E. Wesenberg. Is that [105] his signature?

A. It would appear to be, yes.

Q. I show you Plaintiff's Exhibit No. 4, a writing purporting to be the signature of O. E. Wesenberg. Is that his signature? A. It is.

Q. How about the fourth policy?

Mr. Stump: There is no lender's loss payable

(Testimony of Charles Herrold.)

clause on Plaintiff's Exhibit 1, your Honor. It only involves the three policies.

May I at this time, if the court permits, read for the record that on the mortgagee's clause form, No. 372, of Plaintiff's Exhibits 2, 3 and 4, there appears an identical writing, as follows: "Our loan on this property was paid in full on December 24, 1951. Therefore, we hereby release any and all interest in this policy, July 28, 1955, O. E. Wesenberg, vice president, Farmers & Merchants Bank of Long Beach," and the address of the bank.

I have no further questions of this witness.

The Court: Aren't you satisfied with that, counsel?

Mr. Castro: I am. It is the bank's privilege to release it and as long as they have a record to show the release, I certainly don't want to go into it any further.

The Court: Any cross-examination?

Mr. Castro: No cross-examination. [106]

The Court: That's all then.

(Witness excused.)

Mr. Stump: I think at this time Truman B. Stivers should be recalled.

The Court: Yes.

TRUMAN B. STIVERS

recalled as a witness herein, being previously duly sworn, was examined and testified further as follows:

Direct Examination

(Continued)

By Mr. Stump:

Q. Mr. Stivers, did you testify when you were last on the premises, the insured premises, before the fire?

A. Before the fire? I really don't know.

Q. Do you have any recollection of being there during the year 1954?

A. Yes, I was there during that time.

Q. Do you know what date the fire occurred?

A. Yes.

Q. What date?

A. October—well, I don't know. I happened to be in Lindsay on that day.

Q. Were you on the premises on the day of the fire?

A. On the day of the fire. We saw all the smoke from town and we drove out there to see what it was. We actually didn't get on the premises, but were on the highway next to [107] the property.

Q. Do you know of your own knowledge that persons were living on the premises at the time of the fire?

A. Yes, I do.

Mr. Stump: I think that's all we have at this time. Counsel may cross-examine.

The Court: May I ask, at any time during the

(Testimony of Truman B. Stivers.)

time that you knew that you were not operating as a packing house, whether you ever discussed it with any of the general agents of any of these companies or any of these special agents?

The Witness: No, I did not.

The Court: As far as you know, you never communicated that information to any of them?

The Witness: No. I was under the impression——

The Court: You were simply under the impression that the trailer there with the people living in it on the premises was sufficient?

The Witness: Yes, that's right.

The Court: All right. Cross-examine.

Cross-Examination

By Mr. Castro:

Q. At no time involved in any of the insurance coverages in this lawsuit have you been an agent or an employee or a representative of any kind of the Queen Insurance Company or the Insurance Company of the State of Pennsylvania? [108]

A. I have not.

Q. Or have either one of those companies authorized you to act for it in relation to the insurance involved in this lawsuit? A. They have not.

The Court: Do you have anything to do with the settlement of lawsuits for any of these companies?

The Witness: No. That is taken care of by their claims departments.

(Testimony of Truman B. Stivers.)

Q. (By Mr. Castro): You state that you had knowledge in 1950 that fruit was not being packed in this shed? A. During 1950, yes.

Q. When did you first conclude that it was during 1950 that you had this knowledge?

A. I beg your pardon?

Q. When did you first conclude that it was in 1950 that you had knowledge?

A. First conclude?

Q. Yes.

A. I really don't know what you mean. I know that at the time, shortly before the time that we actually wrote the first policy, the plant was in operation, and approximately within the next year, close to a year, I know that the plant was no longer in operation.

Q. After this loss that occurred, did you prepare a [109] written statement and forward it to Girard Insurance Company? A. I did.

Q. And in that written statement did you state, "I am in the Lindsay area on business of my own quite often throughout the year, and on a couple of occasions happened to drive by the packing house and discovered that people occupying it had evidently moved. Fruit was not being packed at the time. I don't remember what season of year this was." A. That is correct.

Q. Nowhere in this statement that you wrote under January 25, 1955, did you mention the year 1950, did you? A. I don't believe I did.

Q. Didn't you tell Mr. Morgan A. Stivers that

(Testimony of Truman B. Stivers.)

his insurance would be in jeopardy if the property was not attended to?

A. I told him that his insurance would be in jeopardy if nobody was living on the property.

Q. Didn't you tell him that if no one was attending the property, that his insurance would be in jeopardy? A. I don't know the exact words.

Q. Would you look at your statement of January 25, 1955? It is down in the lower portion of the page.

A. I used the word "attended" in this letter?

The Court: What was the language used there in the—— [110]

The Witness: In the statement?

The Court: Yes, read it.

The Witness: "After returning to Southern California I mentioned to Mr. Stivers and he arranged for people to occupy the premises. After this Mr. Stivers apparently stationed somebody on the premises most of the time. The reason for my calling to Mr. Morgan Stivers after I returned from Lindsay, when I discovered the property had nobody living there, was under my understanding of the insurance policy covering the property, if nobody was attending the property for a certain length of time, that the insurance would be in jeopardy, but the fact that he did obtain somebody to occupy the premises would comply with the requirements. The above sentence constitutes the effect of my conversation with Mr. Morgan Stivers."

That constitutes it in effect. I don't know the exact words used.

(Testimony of Truman B. Stivers.)

Q. (By Mr. Castro): With reference to the rate being used on this risk, did your office fix the rate? A. My office fixes no rates.

Q. What was the rate fixed by? The Pacific Rating Bureau? A. That is correct.

Q. Was there a special application filed with the Pacific Rating Bureau? [111]

A. Not by my office.

Q. Do you know whether any of the companies filed an application for that purpose?

A. I really don't know.

Q. Do you know whether this property was specifically rated by the Pacific Rating Bureau?

A. No, I don't.

Q. Now, so far as Roy A. McMillan is concerned, did you ask Mr. Russell Baker of the Girard Insurance Company to see whether he could procure the \$20,000 that you couldn't place?

A. I asked if he could find somebody that could place the insurance.

Q. Did you use the expression "broker it for you"? A. I don't recall the word.

Q. Do you understand the phrase "broker"?

A. I don't believe I do.

The Court: Don't you insurance agents with a larger policy generally place it through a broker and he in turn contacts different insurance companies to see how much they can take?

The Witness: A broker can represent any company.

(Testimony of Truman B. Stivers.)

The Court: He doesn't represent any particular company, but he can place the insurance.

The Witness: But he can place the insurance with all [112] companies, yes, sir.

Q. (By Mr. Castro): Did Mr. Morgan A. Stivers ever tell you that the plant was closed permanently, that it would not pack any more, either personally or for leasing out to any other party?

A. No.

Mr. Castro: I believe those are all the questions I have at this time, your Honor.

Redirect Examination

By Mr. Stump:

Q. You knew, Mr. Stivers, that the plant had not been occupied for several years prior to December, 1952, didn't you?

A. There is that word "occupied" again.

Q. Well, operated.

A. It was not operated, but it was occupied.

Q. Did you know at the time that you instructed your clerks to renew the policies that the plant was not occupied?

A. It was not operated, but it was either occupied or would be occupied.

Q. And by occupied you mean——

A. By persons living on the property.

Q. Do you know of your own knowledge whether this plant was operated as an orange packing plant any time after December 1, 1952? [113]

(Testimony of Truman B. Stivers.)

A. No, I don't know.

Q. Do you know that it was not?

A. I am quite sure that it was not. I know that it was not.

Q. Were you there at any time after December 1, 1952, when it was?

A. When it was operating?

Q. Operated as an orange packing plant.

A. No.

Q. But you were there on the day of the fire?

A. I was.

Mr. Stump. I think I have nothing further to ask him, your Honor.

The Court: That's all. May the witness be excused?

Mr. Castro: Yes.

Mr. Stump: Yes.

The Court: You may be excused.

(Witness excused.)

The Court: I think you better call your short witnesses, counsel. Apparently you are not going to finish today, and tomorrow is a holiday.

Come forward. [114]

HOWARD STIVERS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Howard Stivers.

(Testimony of Howard Stivers.)

Direct Examination

By Mr. Stump:

Q. Mr. Stivers, are you related to Morgan A. Stivers? A. Yes.

Q. What is that relationship?

A. Brother.

Q. Are you associated with him in business?

A. Yes.

Q. Is that in the form of a partnership?

A. Partners?

Q. Are you partners with your brother?

A. Yes.

Q. In what business are you a partner?

A. Building and contracting.

Q. Were you in partnership with him in the business of the packing plant?

A. At one time I had an interest, but in the last few years I hadn't had any interest in it.

Q. Do you recall when your interest in the [115] packing plant terminated?

A. Oh, I believe it was about 1950 somewhere, way back there.

Q. Since that time you have had no interest in the packing plant? A. No.

Q. Was your name ever on a deed to the property? A. No.

Q. What was the nature of that interest that you had, Mr. Stivers?

The Court: What do we care about that? We

(Testimony of Howard Stivers.)

want to know whether he had any interest at the time these policies were executed.

Q. (By Mr. Stump): Did you have any interest in this property on December 1, 1952?

A. No.

Q. Have you had any since? A. No.

Q. Have you been on the premises since December 1, 1952? A. Yes.

Q. What was the last time prior to October 13, 1954, you were on the premises?

A. It was just before, a month or two before.

Q. Were you there for some time or a short time or [116] what?

A. I was there for a few days, done some work.

Q. What kind of work were you doing?

A. Well, we were putting a roof on, putting some windows in, and some other cleaning up, things like that.

Q. At whose request were you there?

A. Through Morgan A. Stivers.

Q. Were you there on the day of the fire?

A. No.

Q. While you were there several months before doing this repair work, of your own knowledge did you observe anyone living on the premises?

A. Yes, there was a family living there.

Q. Where were they living on the premises?

A. They were living in a trailer.

Q. Was this trailer mounted on wheels or jacked up off the ground?

A. I just don't remember. It seemed like it was

(Testimony of Howard Stivers.)

jacked up, because they had the wheels covered up with gunny sacks, or something, from where I was standing. I just noticed that part.

Q. How long of your own knowledge was this packing plant not operated as such?

A. I believe the last time it was operated was in 1949. [117]

Q. Who operated it at that time?

A. American Fruit Growers.

Q. Was it operated, to your knowledge, did Morgan A. Stivers operate it as a packing plant after the Fruit Growers left? A. No.

Mr. Stump: I think I have no further questions of this witness.

Cross-Examination

By Mr. Castro:

Q. Mr. Stivers, wasn't the last time the plant was operated as a fruit packing plant in the spring of 1951 or 1952? A. It was in 1949.

Q. I show you a handwritten statement. Does it bear your signature?

A. Yes, that looks like my signature.

Q. Do you recall giving that statement?

A. Well, at that time I was not sure. He asked me and I told him I thought it was, and I called my brother and asked him, and he said, "I don't remember exactly when it was," and I hadn't been up there very much during those years, 1950, 1951, and I didn't know, and to my knowledge then it

(Testimony of Howard Stivers.)

was, but I found out from checking the records after I got home that it was different. [118]

Mr. Castro: I will offer in evidence this statement as defendants' exhibit next in order.

Mr. Stump: No objection.

The Clerk: Defendants' Exhibit G.

(The statement referred to was received in evidence and marked as Defendants' Exhibit G.)

The Court: Gentlemen, this case resolves itself down to more or less one question, doesn't it, and that is whether or not a trailer parked at the side of this building complies with the terms of the policy?

Mr. Castro: That is one way to phrase it, yes, your Honor.

The Court: Then what does this witness add to what has already been testified to?

Mr. Castro: Nothing.

Mr. Stump: The only thing this witness is called for is to establish he didn't have any interest in the proceeds of these policies. I think he has so testified.

Mr. Castro: Certainly.

The Court: Do you have any questions then?

Mr. Castro: No questions.

The Court: That's all then. Call another witness.

(Witness excused.)

Mr. Stump: Raymond K. Stivers would be called for the [119] same purpose, to prove he had no interest in the property. It is alleged by the defendant in his answer that Raymond K. Stivers has an interest in the property. There also is a paragraph in the complaint that pertains to Girard, that the policy should be reformed to delete Raymond K. Stivers' name from the policy, because his name was included thereon by mistake.

RAYMOND STIVERS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Raymond Stivers.

The Court: Is that the purpose for which you are calling this witness?

Mr. Stump: Yes.

The Court: Then get right down to the point.

Direct Examination

By Mr. Stump:

Q. Mr. Stivers, at any time, have you at any time owned an interest in a packing plant and loading platform at side station, Lindsay, Tulare County, California? A. Yes.

Q. When did you acquire that interest and from whom? [120] A. In 1943.

Q. From whom?

A. From—you mean the owners before we bought into it?

(Testimony of Raymond Stivers.)

Q. No. With whom did you share your interest?

A. With Morgan A. Stivers.

Q. Subsequent to that time did you dispose of that interest? A. Yes.

Q. About when did you dispose of your interest?

A. About 1949 or 1950—about 1950, I believe it was.

The Court: Do you own any interest in this property, or did you at the time of the fire?

The Witness: No.

The Court: What more do you want?

Mr. Castro: I have no questions, your Honor.

The Court: That's all.

(Witness excused.)

Mr. Castro: With counsel's permission, I would ask the court to put a witness on out of order that has to get back, Mr. Edward Myers. [121]

EDWARD L. MYERS

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Edward L. Myers.

The Clerk: Will you spell the last name?

The Witness: M-y-e-r-s.

Direct Examination

By Mr. Castro:

Q. Where do you live, Mr. Myers?

A. Lindsay, Route 1, Box 772.

(Testimony of Edward L. Myers.)

Q. Are you familiar with the packing shed that was known as the Stivers Packing Shed?

A. Yes. I lived next to it there.

Q. About three miles north of Lindsay, California?

A. Yes.

Q. Prior to the name of Stivers Packing Shed, what name did it have?

A. Most people called it the Burr Packing Shed or the Stivers. Those are the only names I knew.

Q. In October, 1954, where were you living with relation to that packing shed?

A. Two or three miles east of it.

Q. Were you also employed at that [122] location?

A. Yes, sir.

Q. You were working for your uncle at the location?

A. Yes.

Q. Did you become acquainted with a man by the name of Morris who had a trailer at the Stivers Brothers premises?

A. Yes. Just by sight and talking to him a few times, neighborly, was all.

Q. On the day that the fire occurred at the packing shed, about what time of the day was it?

A. It was right around 12:00 o'clock.

Q. 12:00 noon?

A. Yes.

Q. Did you see the fire?

A. Yes.

Q. Did you immediately proceed to the packing shed?

A. Called my uncle and then we both went up there, yes.

(Testimony of Edward L. Myers.)

Q. Your uncle is whom, Mr. Myers?

A. Mr. Siegal.

Q. When you got to the packing shed, did you see Mr. Morris anywhere about the area?

A. No.

Q. Did you see his trailer there? A. Yes.

Q. Did you do anything with relation to that trailer? [123]

A. We pulled it away from the fire.

Q. Later that day did you see Mr. Morris?

A. I seen his wife.

Q. Did you see his wife at the shed when you got there and pulled the trailer away?

A. No.

Q. Or did you see their son? A. No.

Q. How much later that day was it that you saw Mrs. Morris?

A. It was around 4:30 or 5:00 o'clock, after their working hours, I guess.

Q. Did they have a job or did they follow some line of work, that is, Mr. and Mrs. Morris and their son?

A. They had been working in the olives, picking fruit, and stuff like that.

Q. What time did they go to work?

A. Oh, about 6:00 or 7:00 in the morning.

Q. In the morning? A. Yes.

Q. About what time would they return?

A. Anywhere from 3:00 o'clock to 5:00 in the afternoon.

(Testimony of Edward L. Myers.)

Q. Did they purchase eggs from you from time to time?

A. Yes, they would stop. That is how I became acquainted [124] with them.

Q. About how long had the trailer been there at the premises at the time of the fire, just approximately?

A. Approximately a month and a half, or a month.

Mr. Castro: You may cross-examine.

Cross-Examination

By Mr. Stump:

Q. Mr. Myers, were you ever on the packing plant property during that month and a half that Mr. and Mrs. Morris and son were there?

A. No, not that I recall.

Q. How do you know that they went to work at 6:00 o'clock in the morning?

A. They always went by and that is what they talked about, was picking olives.

Q. Is that what they told you? A. Yes.

Q. Did you see them working?

A. No, I never did.

Q. At 6:00 o'clock in the morning, you were never on the packing house property while they were living there, except the day of the fire, is that right? A. That's right.

Q. When did you arrive there on the day of the fire? [125]

(Testimony of Edward L. Myers.)

A. Oh, approximately five or ten minutes after 12:00. If the fire started at 12:00, I was there probably five or ten minutes after.

Q. Did you look for Mr. Morris?

A. No, I didn't.

Q. Were there other people there?

A. Yes. There was two men there.

Q. Did other people arrive after that?

A. Yes.

Q. Did you recognize Mrs. Morris on sight?

A. Yes.

Q. How many times had you seen her prior to that occasion?

A. Oh, probably two or three dozen times.

Q. And each time you saw her away from the premises at your place?

A. She would either go by in the car or something like that.

Q. You saw her going by in the car?

A. Yes, sir, or stop at our place.

Q. How old was this son?

A. I would say approximately 16 or 17.

Q. Did you know him by sight, too?

A. I never talked to him very much or anything. Maybe said hello, and that was about it. [126]

Q. But you had seen him? A. Yes.

Q. You would recognize him when you saw him?

A. Yes.

Q. Did you look for him on the day of the fire?

A. No.

(Testimony of Edward L. Myers.)

Q. Your testimony is you didn't see him on the premises on the day of the fire?

A. Well, after—I wouldn't say for sure if I seen him or not. I think he was with his folks there when they come home from work.

The Court: I don't care what you think. Do you know?

The Witness: No, I don't know, not for sure.

Q. (By Mr. Stump): How far did you live from these premises, Mr. Myers?

A. About two or three miles.

Q. In which direction? A. East.

Q. Is that flat country? A. Yes.

Mr. Stump: I have no further questions.

Redirect Examination

By Mr. Castro:

Q. When the Morrisises went to work, did the road that they used go by your uncle's [127] property? A. Most of the time.

Q. And that is when you would see them, about 6:00 o'clock in the morning?

A. Yes, along there.

Mr. Castro: I have no further questions.

The Court: That's all then.

Mr. Stump: That's all.

The Court: Step down.

Mr. Castro: May this witness be excused?

The Court: He may be excused.

(Witness excused.)

Mr. Stump: Your Honor, we had the watchman, Mr. Morris, to come down today. He has not arrived. We have been searching for him most of the day. He may not have got here or he may have gotten lost.

The Court: Must have got on the freeway.

Mr. Stump: I was thinking perhaps, since he is our last witness, except Mr. McMillan, that perhaps we would inquire if counsel cares to proceed with some of his witnesses.

Mr. Castro: If that is all you have, I was going to put McMillan on as my own witness, take him either way, or I have two short witnesses to proceed with.

Mr. Stump: In view of the time, out of courtesy to them, if the short witnesses could go on, they would not be required to come back on [128] Thursday.

Mr. Castro: Then you will rest at this time except for the possible testimony of Mr. Morris?

Mr. Stump: That's right.

Mr. Castro: Mr. Baker.

RUSSELL J. BAKER

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Russell J. Baker.

(Testimony of Russell J. Baker.)

Direct Examination

By Mr. Castro:

Q. Where do you live, Mr. Baker?

A. Pasadena.

Q. What is your occupation?

A. Manager of the Loyalty Group Insurance Company.

Q. In the Loyalty Group, is one of the companies known as Girard Insurance Company?

A. Yes, sir.

Q. In 1952, were you employed by the Loyalty Group? A. Yes, sir.

Q. Were you acquainted with Truman B. Stivers at that time? A. Yes, sir.

Q. Were you also acquainted with Roy A. McMillan? [129] A. Yes, sir.

Q. Did Mr. Stivers make any request to you concerning the placing of any insurance on the packing shed premises just north of Lindsay, California?

A. It was not Mr. Stivers direct. It was Mrs. Woods in Mr. Stivers' office.

Q. What request did Mrs. Woods make to you?

A. Well, she asked us how much we could handle. We told her \$10,000. She said, "Well, we have possibly another twenty in addition to that."

So I got her in touch with Mr. McMillan for placing of additional insurance.

Q. Now, I show you an application form. Do you recognize that as the written application which came in for the placement of this coverage?

(Testimony of Russell J. Baker.)

A. Yes, sir.

Q. And following the receipt of that coverage, did your company then write the San Francisco office for the rate to be used? A. Yes, sir.

Q. And is that under a memorandum dated October 31, 1952? A. Yes, sir.

Q. And then did you have further correspondence concerning the rate to be used on that [130] property? A. Yes, sir.

Q. Is that attached in this memorandum dated February 5, 1953? A. Yes, sir.

Q. Was there a rate established on this property? A. Yes, sir.

Q. And who established the rate on this property? A. Pacific Fire Rating Bureau.

The Court: Who?

The Witness: Pacific Fire Rating Bureau.

Q. (By Mr. Castro): Did it issue a rate?

A. Yes, sir.

Q. Is that the rate shown under Correction Sheet No. 61, dated September 1, 1950?

A. Yes, sir. That was sent to us from our San Francisco office.

Q. In referring to Burr Siding three miles north of Lindsay? A. Yes, sir.

Q. That is the same property which was occupied by the Stivers Brothers?

A. Yes, sir.

Q. Was this property rated as occupied or unoccupied premises?

(Testimony of Russell J. Baker.)

A. Occupied premises right there on the rate sheet. [131]

The Court: Is there anything on there to show it was occupied?

The Witness: Your Honor, if it was not occupied, it would say vacant right behind the top line there where it says packing shed, you see, under Burr Warehouse. The formula for the rating bureau is if it is a vacant building, it shows vacant right opposite the risk.

Mr. Castro: I offer these documents that have just been referred to as defendants' exhibit next in order as a composite exhibit, your Honor.

The Court: They may be so admitted.

Mr. Stump: Is that offered in evidence, counsel?

Mr. Castro: Yes.

The Clerk: Defendants' Exhibit H.

(The exhibit referred to was received in evidence and marked as Defendants' Exhibit H.)

The Court: Are those rates set by the Pacific Fire Rating Bureau?

The Witness: Yes. Anything over four units of dwelling classification are rated by the rating bureau.

Q. (By Mr. Castro): At any time did Mrs. Woods tell you that the premises would be idle or not operated as a packing shed? A. No, sir.

Q. Would that have made any difference in issuing [132] coverage, the rate to be used on these particular premises?

(Testimony of Russell J. Baker.)

A. As far as coverage, we wouldn't have written as large a line as we did if it was vacant, and if it was the vacant, the rate would have gone up.

Q. Are you familiar with the Watchman's Warranty or Watchman's Endorsement?

A. Yes, sir.

Q. Is there a standard form of Watchman's Endorsement for this type of location?

A. There is a standard form of Watchman's Endorsement put out by the Rating Bureau.

Q. That is the Pacific Rating Bureau?

A. Yes, sir.

Q. What is the effect of that Watchman's Endorsement so far as rating is concerned?

A. It gives a credit in the over-all rate of about 25 cents per hundred dollars of insurance.

Q. When is the first time you received any knowledge that the property had not been occupied?

A. Last Friday.

Mr. Castro: You may cross-examine.

Cross-Examination

By Mr. Stump:

Q. Mr. Baker, what did you say your capacity is? [133]

A. Manager of the Pasadena office for the Loyalty Group Services, the service office for that area.

Q. You are a special agent for the Loyalty Group Company? A. Yes.

(Testimony of Russell J. Baker.)

Q. Is Girard one of those companies?

A. Yes, sir.

Q. And Mr. McMillan is an agent for Girard—I mean for——

A. He is an agent for one of our companies, yes, sir.

Q. It is not Girard?

A. No, sir. Firemen's.

Q. Firemen's Insurance did not run any policies on this premises? A. No, sir.

Q. The request for rating here was submitted on whose request, Mr. Stivers' office or Mr. McMillan's office?

A. When you get an order in like we got in, I will give you the sequence. We wrote or we requested the rating from San Francisco. When we got the information, we gave it to Mr. McMillan so he could write his policies in the companies he put them in.

Q. So you requested this information as to rating for the purpose of issuing a policy of Girard, is that correct? [134] A. That is correct.

Q. When you testified on direct, you stated that if the premises had been insured as unoccupied, there would have been the word "Vacant" on there, is that correct?

A. Not on the policy itself, but on the rating sheet, that is what I testified.

Q. In other words, you are stating unoccupancy and vacancy are the same thing?

A. No. If a risk is not occupied, according to

(Testimony of Russell J. Baker.)

the Pacific Fire Rating Bureau, it shows Vacant opposite the classification of the risk.

Q. What would happen if the plant were operating but vacant?

A. I don't see how it could operate and be vacant.

Q. Isn't it a fact that vacancy relates to the absence of physical possession of the building?

The Court: How could they occupy it, counsel, and operate it, without somebody physically being present?

Mr. Stump: It would depend, your Honor, I think, on the use to which the thing is put. Permission in this policy is granted without any limitation whatever to put them out of occupancy. If these documents here that have been presented have Vacant on them, that is in error because the buildings were never vacant, unless he is testifying that——

The Court: According to the testimony here, the building [135] was not actually occupied. There were people living in a trailer beside it.

Mr. Stump: But, also, your Honor, I believe the buildings were never vacant. There were machinery belts, the storage boxes, by the admission of the pleadings. There was everything that it took to require the operation of the plant still in the building at the time of the fire. There was no time when these premises were ever vacant. It was merely that they were not being used to operate for the purpose of a fruit packing plant at the time.

(Testimony of Russell J. Baker.)

Now we have a witness on the stand stating that if the building had been unoccupied, in requesting a rate they would have entered the word Vacant there. I am trying to ascertain if in requesting a rating, if the word Vacant is used to mean the same as unoccupied.

The Witness: I would say as far as the Rating Bureau is concerned, it would be the same, yes.

Q. (By Mr. Stump): It would be the same rating for either unoccupied or vacant?

A. It would have Vacant behind the rating memorandum.

Q. You stated if the word Vacant had appeared there, that you would have written a policy, but for not so great a coverage.

A. I know the first underwriter in San Francisco would not have accepted that much of a line of \$10,000 for that particular coverage. Probably half of that at the most, [136] if we had known it was vacant.

Q. Did you request a similar rating on this property in 1949, Mr. Baker? A. Yes.

Q. Do you have the documents concerning that request here?

A. No, sir. We don't keep them that long.

Q. Have you had occasion to review or to look at those documents since this controversy has arisen? A. You mean the ones from 1949?

Q. From 1949.

A. We only keep the expirations for three to six months after they expire. As soon as a new

(Testimony of Russell J. Baker.)

policy went into force, the others were destroyed.

Q. You don't know whether there was any notation on that request, whether it was vacant or unoccupied?

A. I am reasonably sure there was not, but I couldn't swear to it. Excuse me, counsel?

Q. Yes.

A. I think you could get that information from the Pacific Fire Rating Bureau in San Francisco.

Q. Do they keep their records longer than the six months' period? A. Yes, sir.

Q. They rate for any company? [137]

A. Yes. You see, they are maintained by all the companies and it is operated by the State, and any risk other than a dwelling of under four units is rated by them, and all companies that subscribe to the Bureau get that rate from the Bureau. It is a non-profit making bureau.

Q. In every case where fire insurance is written, is a request for rating forwarded to the Pacific Underwriters?

A. Oh, yes, or else it is written automatically. They have their men going around all the time rating risks. The reason we had to request this rate up in that area is it was not in this district. This district only goes as far as Bakersfield, and from there on to the Oregon border it is another district, and that is handled through the San Francisco Rating Division.

Q. At the time the rate is requested, does that mean before the rate is established someone from

(Testimony of Russell J. Baker.)

Pacific Underwriters goes to the property and looks at it?

A. Yes, sir. All those are done personally, yes, sir.

Q. So at the time these ratings, before the ratings come back to you, someone from Pacific Underwriters had gone to the packing house property in Lindsay and observed the property, is that right?

A. Yes. When that rating is published, the date they were there will show on that publication in your exhibit, and that is the last time they were there. At the [138] top of the page you will see the date that they were there.

Q. Is it true it was also visited——

Mr. Castro: He doesn't know that.

Mr. Stump: He doesn't have that knowledge. All right.

The Court: When they fixed the rate, if it was unoccupied, they would have known it.

The Witness: Not necessarily. You see, they don't go out and inspect again unless they hear of a change or somebody calls it to their attention.

The Court: Don't they go out and inspect the property when they fix the rate?

The Witness: Yes, but—what date is that rating at the top of the page?

Mr. Stump: It says September 1, 1950.

The Witness: That was more than likely the last time they were there. Say, for instance, your Honor, that instead of a packing house, it became a warehouse, and the owner of the property or the

(Testimony of Russell J. Baker.)

agent for the owner of the property or the company said here that it had been changed, it would probably be beneficial to the insured and we would request a rerating and they would send a man down from San Francisco on the rerating, but they don't go around unless they hear of some change.

The Court: In other words, this is a rate they fix in their own office? [139]

The Witness: After a survey of the property.

The Court: Originally it was fixed by a survey of the property, but it doesn't necessarily mean they have done it at the time these policies were written.

The Witness: No. That was some time prior to the issuance of the policies.

Q. (By Mr. Stump): Didn't you just testify at the time this request in 1952 was made for a rate to the Pacific Underwriters Bureau that someone from that Bureau visited the property?

A. No, sir; I did not. I said that we asked our San Francisco office to get a copy of the existing rate. You misunderstood me there. In other words, we wrote to San Francisco as per the letter asking for the published rate at the time the policy was going to be written. Do I make myself clear?

Q. I understand you now, yes, but I was under the impression while you were testifying that you were testifying to the application made in 1952.

A. No, sir.

The Court: That was the established rate?

The Witness: We didn't have the rates down

(Testimony of Russell J. Baker.)

here, so we had to write to our San Francisco office to get the published rate from the Bureau in San Francisco, which was a couple of years after the rate was published. [140]

Q. (By Mr. Stump): To your knowledge, was a rating made subsequent to that time, this 1950 rating?

A. Was there a rate made after this?

Q. Yes.

A. As far as I know, that rate is still in force.

Q. I show you here Plaintiff's Exhibit No. 2, Girard Insurance Company policy, and call your attention to a red stamp on the side which says "Pasadena."

A. That was written in our office.

Q. You stamped that on there in your office?

A. Where do you see that? That is Pasadena Survey?

Q. It is stamped on the margin of the policy on the left-hand side near the top.

A. Yes. That policy is sent down to our office from San Francisco.

Q. What is the significance of that stamp, Pasadena Survey, on the margin?

A. That means that the policy was issued in the Pasadena office rather than Los Angeles, San Francisco, Sacramento or some other office.

Q. That explains the Pasadena part, but what is the survey?

A. Survey means that is the issuing office of the policy itself, you see.

Q. Isn't it rather, Mr. Baker, that survey means

(Testimony of Russell J. Baker.)

there [141] was a survey of the premises made at the time?

A. No, sir; it does not. That has nothing to do with it. Survey is a term used in the fire insurance business for the issuing office. That's all that means.

Q. May I ask for the record, Mr. Baker, where did you obtain this printed rating sheet?

A. From our San Francisco office.

Q. And when did you obtain it?

A. The date will be right there, if you will see that letter where we asked for it. They mailed it right back to us. Do you see the letter signed by my secretary asking for the rate? Then, of course, as soon as they could possibly get it from the San Francisco Rating Bureau, they mailed it back to me so we could issue the policy.

Q. What does this mean here, "We believe you have quoted us the dwelling rates for this location"?

A. You will have to bring it up to me, sir.

Q. (Handing document to witness.)

A. On the back here they have quoted some rates that were the dwelling house rates, and then we sent this back to them with this memorandum, and that is when they sent this.

Q. Was there anything, Mr. Baker, in your communication to the Pacific Underwriting Bureau that would lead them to believe that you asked for dwelling house rates?

A. In the first place, I did not communicate directly [142] with the Pacific Fire Rating. I

(Testimony of Russell J. Baker.)

communicated with our home office in San Francisco.

Q. They asked for the rates?

A. They asked for them.

Q. I guess I am unusually thick on this, because I am not experienced in insurance matters, but now I have that straight. Did you communicate to your San Francisco office anything which would lead them to inquire of the Pacific Underwriters as to dwelling house rates for a packing house?

A. I couldn't imagine. The girl who wrote the letter is my secretary and she probably gave the location and the underwriter in our San Francisco office probably gave us a dwelling house rate in Lindsay, and then we had to write again and explain this was a packing house and not a dwelling house, and then we received the rate sheet.

Q. In other words, when the initial request was made to your office, they were under the impression you were asking for dwelling house rates?

A. That could have been.

Q. They did not know the subject of the insurance was considered to be a packing house and loading platform?

A. That could have been possible, yes, sir.

Mr. Stump: I think I have no further questions of this witness.

Mr. Castro: I have no questions. [143]

The Court: Gentlemen, have you any further witnesses from out of town?

Mr. Castro: I have one witness, your Honor, on

this rate situation who would probably take five minutes.

The Court: Where is he from?

Mr. Castro: He is from Southern California. He is local, I should say, your Honor, as far as convenience is concerned.

The Court: It is our adjourning hour.

Mr. Castro: That is perfectly satisfactory to me. We have to come back Thursday. There is no question about that.

The Court: Then that's all. You may be excused.

(Witness excused.)

The Court: How long are you going to take on Thursday?

Mr. Castro: I would think it would take me not more than an hour to an hour and a half, your Honor.

Mr. Stump: I think we should be through by noon, your Honor, saving oral argument, or something of that sort.

The Court: I can read better than I can listen, counsel.

Mr. Stump: I think we should have all the testimony in by noon.

Mr. Castro: I would definitely say we would.

The Court: Then we will take a recess until 10:00 o'clock Thursday morning.

(An adjournement was taken to Thursday, February 23, 1956, at 10:00 o'clock a.m.) [144]

February 23, 1956—10:00 o'Clock A.M.

The Clerk: Case No. 18737-BH Civil, Morgan A. Stivers vs. National American Insurance Company, et al.

The Court: You may proceed, gentlemen.

Mr. Stump: At this time, your Honor, the plaintiffs would like to call their last witness, Mrs. Ruby Morris.

RUBY MORRIS

called as a witness on behalf of the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Ruby Morris.

The Court: Relax and make yourself at home.

Direct Examination

By Mr. Stump:

Q. Mrs. Morris, will you answer these questions so I can hear you and so the court can hear you.

Are you familiar with the packing house property of Morgan A. Stivers in Lindsay, California?

A. Yes.

Q. Have you ever lived on that property at any time? A. Yes.

Q. Will you tell the court what dates you lived on the property, if you recall?

A. We moved there the 3rd day of July. [145]

Q. Of what year? A. '54, I think.

Q. How long were you there?

A. We were there until the 14th of October.

Q. While you were there did a fire occur?

(Testimony of Ruby Morris.)

A. It occurred the 13th of October.

Q. When you say "we were there," who was there with you? A. My husband and my son.

Q. And how old is your son?

A. He is 17, now.

Q. What were your living accommodations there?

A. We had hot water in the bath. We had electricity. We had showers. The same as we would have if we were in a camp.

Q. And did you live in a trailer there?

A. Yes.

Q. Where was this trailer situated in relation to the packing house, the bunk house?

A. It was, I'll say, about 50 feet from the packing house and maybe 30 or 40 feet from the bunk house.

Q. And it was situated between the packing house and the bunk house? A. Between them.

Q. Is that right? [146] A. Yes.

Q. Now, the three of you living there, what was the frequency of your presence there?

A. There was one of us there all the time.

Q. And did you perform any duties in relation to the packing house?

A. No. We just kept the people from going in, or anybody being around.

Q. Did any occasion ever arise when someone tried to go in?

A. Well, they came and we would tell them that we had no permission to let them go in. And at one time they came and brought a note and they went

(Testimony of Ruby Morris.)

in anyway, with us telling them; and my husband went in and brought them out and told them that unless Mr. Stivers came with them they were not to go in, that we had no permission to let anybody in.

Mr. Stump: I think that is all, your Honor.

The Court: You lived completely in your trailer, did you not?

The Witness: Yes.

The Court: Did you have access to the packing house?

The Witness: No, we weren't to go—we didn't go in at all. We didn't go in at all.

The Court: Did you have the keys to go in?

The Witness: No, we had no keys. [147]

The Court: What arrangements did you have in placing the trailer there?

The Witness: Mr. Jim Stivers came and wanted us to move there and watch the packing house. And he pulled the trailer there himself.

The Court: Well now, you say you had hot water and so forth. That was with the trailer, was it not?

The Witness: He had hot water. He had the butane tanks himself. He fixed the hot water himself. And he fixed the showers and he fixed the lights.

The Court: They were all in the trailer?

The Witness: No, they weren't. The lights were in the trailer, but the hot water wasn't in the trailer.

The Court: Where was the hot water?

The Witness: In the shower.

(Testimony of Ruby Morris.)

The Court: Where was the shower?

The Witness: Well, it was out between the trailer and the packing house.

The Court: A separate room there for that purpose.

The Witness: Yes.

The Court: Were you paid anything to stay there?

The Witness: We got our rent for staying there.

The Court: Permission to stay on the land?

The Witness: Yes, and watch it. They paid the electricity. They paid for the water, for the pump, the big pump. And we [148] paid our lights.

The Court: You paid your own lights?

The Witness: We paid our own lights, and they paid the rest.

The Court: Now, did you and your husband work?

The Witness: Yes. Sometimes he worked for himself; and sometimes we both worked.

The Court: How about your son?

The Witness: Well, sometimes he worked and sometimes he didn't.

The Court: Did he go to school?

The Witness: No.

Cross-Examination

By Mr. Castro:

Q. Where do you live, Mrs. Morris?

A. We live in Porterville on West Morton, 360, auto court—trailer court. It's Scott's, H. L. Scott's.

(Testimony of Ruby Morris.)

Q. What was the date of your son's birth?

A. September 16, 1938.

Q. And he was 16 at the time of this fire?

A. Yes.

Q. Were you on the premises on the day of the fire, at the time of the fire?

A. We left that morning. I say "we"; my husband and I went to work. [149]

Q. What time did you leave the premises?

A. We left about 5:00 that morning.

Q. What time did you return?

A. We returned about 4:00 o'clock.

Q. 4:00 in the afternoon?

A. Around close to 4:00.

Q. And by that time the fire had destroyed the packing house? A. Yes.

Q. And your trailer had been removed from the area, had it?

A. They pulled the trailer across the road.

Q. And Mr. Stivers and Mr. Seigel had taken care of the trailer for you?

A. Yes. Well, I don't know what their name was. The egg man is what I call him—the egg man.

Q. What time did you usually leave to go to work?

A. We left early because we didn't—we usually left around 5:00 o'clock and came in around 2:00.

Q. And what time would your son leave when he went to work?

A. Well, he didn't—sometimes he didn't work

(Testimony of Ruby Morris.)

and sometimes he did. If he worked he went with us.

The Court: Did he work on that particular day?

The Witness: Yes, I believe he did. [150]

Q. (By Mr. Castro): Where was he working on that day? A. We were picking olives.

Q. Where?

A. Well, I can't tell you. It was on Indiana, but I can't tell you the other street, I mean the other road.

Q. About how far was it from the packing house? A. Well, it was at Porterville.

Q. At Porterville. Do you know the name of your employer there, or his employer?

A. We were working for Mel Messenger. We were working for Sunland.

Mr. Castro: Those are all the questions I have.

Mr. Stump: I have nothing further, your Honor.

May this witness be excused?

The Court: Yes.

(Witness excused.)

Mr. Stump: The plaintiff will at this time rest, your Honor.

Mr. Castro: We discussed with counsel the facts that I neglected to ask Mr. Ed Meyer about on Tuesday afternoon, your Honor; namely, one, where the fire was when he first observed it, and counsel is willing to stipulate that if Mr. Meyer were called to testify that he would testify that the

fire was first observed by him in the packing house building itself, the north section of it, and then spread [151] from there to the other properties which were destroyed at the time of the fire.

Mr. Stump: That is correct. We so stipulate.

Mr. Castro: And the other thing which I would like to present to the court, which can be done by stipulation, is a diagram which was prepared by Mr. Stivers and Raymond K. Stivers at the time of the examination under oath, just generally showing the locations of the buildings involved in the loss. And I ask that it be marked as defendant's exhibit next in order.

The Court: Any objection?

Mr. Stump: No objection.

The Court: It may be admitted in evidence.

The Clerk: Defendants' Exhibit I.

(The exhibit referred to was marked Defendants' Exhibit I and received in evidence.)

The Court: I was wondering whether you were through with your cross-examination of Mr. Stivers. I just wondered if you were finished with him.

Mr. Castro: I think I had, substantially, except for some of these matters which are being taken care of by stipulation.

Mr. Donald, would you take the stand, [152] please?

GEORGE DONALD

called as a witness by the defendants, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: George Donald.

The Clerk: That is spelled D-o-n-a-l-d?

The Witness: Yes.

The Court: You have got kind of a weak voice, haven't you?

The Witness: I am sorry. I am a little hoarse.

Direct Examination

By Mr. Castro:

Q. Where do you live, Mr. Donald?

A. I live at 5522 Green Meadow Street, Torrance, California.

Q. What is your occupation?

A. I am chief underwriter of the H. F. Ahmanson & Company.

Q. What is H. L. Ahmanson & Company's relationship with the National American Insurance Company? A. We are general agents.

Q. Now, were you an underwriter with H. F. Ahmanson & Company in October 1952?

A. Yes, sir.

Q. What experience had you had in underwriting at that [153] time?

A. At that time I had been underwriting for six years.

Q. Prior to that had you had other experience in underwriting? A. No, sir.

(Testimony of George Donald.)

Q. Now, have you brought with you the file of the H. F. Ahmanson & Company concerning the underwriting of this loss?

A. Yes, sir. I have our daily report.

Q. And did you receive a written application from Truman B. Stivers?

A. We attached to our file a typewritten application from the Truman B. Stivers Agency, yes, sir.

Q. And is it dated?

A. It is dated October 29, 1952.

Q. Do you have any receipt as to when it was received by your company?

A. Received on October 31, 1952.

Q. Now, after receipt of that application were any steps taken to determine the rate to be used on the risk?

A. Yes. On November 3rd we wrote to the Pacific Fire Rating Bureau, their San Francisco office, requesting rates in order to write this particular risk.

Q. Do you have a copy of that letter or request which was made to the Pacific Fire Rating Bureau?

A. Yes, sir; I have. [154]

Q. Did you receive a response from the Pacific Fire Rating Bureau?

A. On November 7th their rating department indicated that there was no published rate available for this property.

Q. And thereafter were any steps taken by the

(Testimony of George Donald.)

general agency of H. F. Ahmanson & Company to fix a rate?

A. Well, in order to write our policy we applied a tariff rate and then made application to the rating bureau again in San Francisco asking them to inspect the risk and publish a rate for us.

Q. Now, under what date did you make the application?

A. Our application was dated November 28, 1952.

Q. Was that a written application?

A. Yes, sir.

Q. What did that application reflect as to the question of the occupancy of the property?

A. Our application states—there is a provision on this application to designate type and occupancy of risk, and we have typed in our office, “packing house and loading platform, bunk house and storage building.”

Q. And did the Pacific Fire Rating Bureau then establish a rate on this risk?

A. Yes, they did.

Q. As of what day?

The Court: Counsel, hasn't that been admitted in evidence [155] already?

Mr. Castro: Not this one, your Honor. This is a subsequent application that was made. The earlier one was September 1, 1950, which was a rate fixed when the Burr people were occupying the property.

The Witness: The rating bureau issued their publication on May 22, 1953, and established the

(Testimony of George Donald.)

effective date of the rates as being December 1, 1952—in response to your question.

Q. (By Mr. Castro): And is that rate identified in any way by sheet number? A. Yes, sir.

Q. How is it identified?

A. It was published under Correction Sheet No. 113, Lindsay, California, rate book, page 49; and the rates are identified on lines 10, 11 and 12.

Q. And does the rate as published indicate what type of occupancy it was rated?

A. They rated it as follows: A D—as in David—Class citrus packing house; D—as in David—Class box storage shed; and D—as in David—Class bunk house.

Q. Now, what does “D” stand for?

A. “D” is merely a classification of structure.

Q. Now, does the published rate reflect as to whether or not it was in an unprotected fire area?

A. This particular rate sheet will not establish that. [156] But in the front of each rating book there is a guide as to what is protected and unprotected.

Q. And are you familiar with that guide as to this? A. Yes, sir.

Q. Would you state what it shows as to being protected or unprotected area?

A. This was classed as being unprotected area.

Mr. Castro: At this time, your Honor, I would offer in evidence, as a composite exhibit, the written application by Truman B. Stivers dated October 29, 1952; a copy of the letter of November 3, 1952,

(Testimony of George Donald.)

wherein Ahmanson applied to the Pacific Fire Rating Bureau; and a copy of the application which it made to the Pacific Fire Rating Bureau on November 28, 1951; and a copy of the published rate as established by the Pacific Fire Rating Bureau on May 22, 1953, effective December 1, 1952.

The Court: Where would that be material except as to the application, counsel?

Mr. Castro: The purpose of issuing it is to show that Ahmanson & Company was dealing with it on the basis of an occupied citrus packing house and so applying, and the rate that was established was based upon an occupancy——

The Court: Well, counsel, I have been trying to find out this morning what you mean by "occupancy," and I don't know what you mean by an occupied citrus packing plant.

Mr. Castro: Well, the cases have defined it, your Honor. [157]

The Court: Isn't it true that all the equipment was in the packing house ready for use?

Mr. Castro: Yes, your Honor.

The Court: And I think that the case is going to turn a great deal upon what is meant by occupancy under an insurance policy.

Mr. Castro: May I state at this time what the decisions have held it to be in the past? The terms "vacant" and "occupancy" are alternate terms, not synonymous. The term "vacant" refers to a building wherein the usual contents of that building, inanimate objects, have been removed and the build-

(Testimony of George Donald.)

ing is empty. The term "occupancy" refers to a building which has its normal contents but is not being put to the use for which the contents and the building were designed.

The Court: Well, I think that is one of the questions that you gentlemen are going to have to brief. I don't know whethere there was any direct testimony, but I believe it has been admitted by all parties that the plant was not in use——

Mr. Castro: That is right.

The Court: ——but ready for use.

Mr. Castro: That is right.

The Court: Now, when the building is equipped and ready for use is it occupied or unoccupied?

Mr. Castro: The decisions hold that it is occupied. There are two Ninth Circuit cases, one on a packing house and [158] the other on a factory, and California cases which I am familiar with dealing with a dwelling house.

The Court: Of course, a dwelling house is a little different, in a different category.

Mr. Castro: No, your Honor.

The Court: A dwelling house means it is occupied by human beings. A packing house might not necessarily be.

Mr. Castro: No. But occupied by putting it to the use—it has to be a used building as distinguished from unused.

The Court: Well, I am not going to argue the point now. But I think that is the point you gentlemen are going to have to brief.

(Testimony of George Donald.)

Mr. Castro: We filed trial briefs, and in the trial briefs we did cover—at least, I cited the cases I referred to at this time.

The Court: Well, I say frankly that I enjoyed Washington's Birthday and I didn't do any work yesterday.

Mr. Castro: I understand that landed unexpectedly in your lap Tuesday morning and you didn't have an opportunity to look at the pleadings, perhaps, that came in to you. But that is the purpose, the thought with which we are proceeding.

I will now offer in evidence the documents which I have referred to.

The Court: I don't see where they are admissible, except the application. Where is the insured bound by intercommunications [159] between the rating bureau and general agents?

Mr. Castro: Well, it shows the general agent's reliance upon the written application in applying to the rating bureau.

The Court: I know. I think the application would be admissible. But I don't see where the communications with the rating bureau would have any bearing upon this. They wouldn't prove anything one way or the other.

Mr. Castro: I have made the offer, your Honor.

The Court: I will admit the application.

Mr. Castro: And then may I have the other documents marked for identification, your Honor?

The Court: Unless counsel for the plaintiff wants them all in.

(Testimony of George Donald.)

Mr. Stump: Your Honor, we are not going to interpose any objection to their admission; although, I concur with the court that the intercommunications between Ahmanson and the rating bureau——

The Court: Well, counsel either consent to their admission or——

Mr. Stump: I consent to their admission.

The Court: All right. They are all admitted in evidence.

The Clerk: Exhibit J.

(The exhibit referred to, marked Defendants' Exhibit J, was received in evidence.) [160]

The Court: May I ask a question so I won't have to examine the papers? Does the application state whether it was occupied or unoccupied?

Mr. Castro: It gives the occupancy, that bracket for occupancy, as "packing house and loading platform," and refers to "bunk house" on the bunk house section.

The Court: What was the bunk house used for?

Mr. Stump: The bunk house was used to house this family that was living there prior to the Morris, who just testified this morning, and before the packing house was closed it was used by the crews during the packing season for their convenience.

Q. (By Mr. Castro): Now, Mr. Donald, in placing the rate which was used by the Ahmanson Company, or National American, on the packing house

(Testimony of George Donald.)

frame building, was it based on an occupied building or an unoccupied building?

A. On an occupied building.

Q. And had you known there was an unoccupied building, what would have been done with regard to the application? A. You mean——

Q. Whether it would have been accepted.

A. The application for insurance?

Q. Yes.

A. Well, it wouldn't have been nearly so acceptable in my opinion. [161]

Q. And why not?

Mr. Stump: I will object to the question as calling for a conclusion of the witness. I don't think he has been qualified to determine whether or not the packing house occupied or unoccupied is more acceptable. He is merely an underwriter here on this matter.

The Court: Well, counsel, I don't think we are interested in what the rate would have been, or if there had been any rate in the event of an occupancy. I think it is a question here of what we mean by "occupancy."

Mr. Castro: Then those are all the questions I have on direct examination.

Cross-Examination

By Mr. Stump:

Q. Mr. Donald, you testified that the two requests were made to the Pacific Rating Bureau, is that not right? A. Yes, sir.

(Testimony of George Donald.)

Q. And the date of the second request was when?

A. I believe it was November the 3rd.

I am sorry. November 28, 1952.

Q. 1952? A. Yes, sir.

Mr. Stump: May we have Plaintiff's Exhibit 1?

(Whereupon the document was handed to counsel.)

Q. (By Mr. Stump): Mr. Donald, are you familiar with the [162] National American Insurance Company policies? A. Yes.

Q. I show you here a policy of the National American Insurance Company which says "dated issued"—is that the date it issued?

A. The date it was typed in our office.

Q. Then the rate was determined on that date, was it not?

A. That's right. We rated it. We applied a tariff rate as a manual rate.

Q. And this policy left your office with this rate on it, is that correct? A. That is correct.

Q. And that date is November 18, 1952, is that correct? A. That is correct.

Q. On this second request, do you know the exact date of that request? That is, what you asked the Pacific Fire Rating Bureau to do?

A. I do. I have a copy.

Q. Did you ask them to go out and inspect the premises? A. That's right.

Q. And did they go out and inspect the premises? A. They did.

(Testimony of George Donald.)

Q. Did they report back that the plant was not operating as a fruit packing plant? [163]

A. No, sir.

Q. However, the Pacific Fire Rating Bureau went at your request to inspect these premises, isn't that right?

A. I can't establish that definitely. The only tie-in I have is that under our "remarks" we asked them to please publish the rate effective December 1, 1952, in order to take care of the effective date of our policy; and the rate was published on that date to be effective December 1, 1952.

Q. What was the date of the publication?

A. The publication sheet we received was dated May 22, 1953.

Q. Then sometime between the date of your request and the date of publication on May 22, 1953, your representatives from Pacific Fire Bureau called and inspected these premises? Isn't that right?

Mr. Castro: If he knows. He wasn't present, I am sure. They are in San Francisco and he is in Los Angeles.

Q. (By Mr. Stump): That was their duty?

A. That is their normal——

The Court: He isn't testifying to a lot of matters that he doesn't know about, is he?

Q. (By Mr. Stump): You rely upon these rating given you by the Pacific Fire Rating Bureau, do you not? A. Yes, sir.

Q. Now, if they had called at these premises and

(Testimony of George Donald.)

found [164] them unoccupied what would have been their report back to you?

A. In the past it has been customary to give us a form letter stating what they found that's not in accordance with our application. In other words, they would have advised us that the property was unoccupied or vacant or nonexistent.

Q. In this case you received no form letter advising you that there was any difference in the property as inspected from the property as reported on your application? Isn't that right?

A. That is correct, sir.

Q. And isn't it a fact that your application merely identifies "packing house, loading platform, bunk house" as the physical description of the objects?

A. They asked us—it is always our intent to advise them of occupancy as a means of further identification. They have specified on their regular printed application a space to be filled in and it is captioned "type and occupancy of risk."

Q. I see. And these items are listed under that particular phrase? A. Yes, sir.

Q. "Type and occupancy of risk"?

A. Yes, sir.

Q. If, Mr. Donald, you had received a notice from your agents, the Pacific Fire Rating Bureau, that the plant was [165] unoccupied, what would your company had done?

Mr. Castro: The court sustained an objection——

(Testimony of George Donald.)

The Court: You are asking for a conclusion again.

Mr. Stump: Yes, sir.

I think I have no further questions.

Mr. Castro: I have no further questions.

May the witness be excused, your Honor?

The Court: As far as the court is concerned.

Mr. Stump: Yes.

The Court: You may be excused.

(Witness excused.)

ROY A. McMILLAN

a witness called on behalf of the defendants, having been previously sworn, resumed the stand and testified further as follows:

The Clerk: You have been sworn, haven't you? State your name again for the record.

The Witness: Roy A. McMillan.

Direct Examination

By Mr. Castro:

Q. Where do you live, Mr. McMillan?

A. 1117 Mountain Road Drive, Altadena.

Q. What is your occupation?

A. Insurance agent.

Q. How long have you been an insurance agent? [166]

A. About 28 years.

Q. Now, with relation to the defendant Queen Insurance Company and the defendant Insurance Company of the State of Pennsylvania were you

(Testimony of Roy A. McMillan.)

insurance agent for either one of those companies?

A. Yes.

Q. For both? Were you an insurance agent for the defendant National American Insurance Company or Girard Insurance Company?

A. I am an agent for the National American but not the Girard.

Q. Now, where do you maintain your office?

A. 2394 North Lake Avenue, Altadena.

Q. Now, when did you first learn of the Stivers Bros. Packing House there at Lindsay, California?

A. Approximately the date the first policy was written in December '49; probably a little prior to that, which might have been in November.

Q. Who contacted you concerning coverage?

A. Mr. Baker of the Loyalty Group in Pasadena.

Q. Russell Baker? A. Yes.

Q. And thereafter did you obtain coverage for the packing shed? A. Yes. [167]

Q. With what companies did you obtain coverage?

A. Well, at that time I obtained coverage, as I recall, with four different companies. You have the slip there that has the various companies.

Q. Referring to Exhibit——

A. Travelers——

Q. ——D, a letter from Truman B. Stivers. I took it out of your file here in court the other day?

A. Originally we wrote coverage in the Fulton Fire Insurance Company, the Insurance Company

(Testimony of Roy A. McMillan.)

of the State of Pennsylvania, the Queen Insurance Company of America and the Travelers Insurance Company. And they had coverage with the Girard Fire Insurance Company.

Q. Now, coming up to the renewal of the coverage, who contacted you concerning coverage for December 1st of 1952? A. In December, '52?

Q. Yes.

A. Prior to that—well, it was—I can't recall at this time just who it was that I talked with. It was a lady in the office, and I don't believe it was Mrs. Woods. It was someone else, as I recall.

Q. Would you state that conversation, if you recall it?

A. It would be pretty hard to do at this time. As I recall, we were to renew several policies and—well, at that time we were to renew the policy in the State of Pennsylvania [168] and in the Queen, and those were the only ones to be renewed: The Travelers Insurance Company policy had been cancelled at the request of the Stivers. I have the date of the cancellation here. Do you want me to check that?

Q. Yes, if you have that date.

A. It was cancelled, short-rate, March 1, 1950.

Q. That policy had been in the amount of \$12,700?

A. Let me see. That policy had been in the amount of \$12,700, right.

Q. Now, what was the amount of the Queen policy issued in December, December 1, 1949?

(Testimony of Roy A. McMillan.)

A. In 1949?

Q. Yes.

A. I don't happen to have that with me, but I might have some information here that might indicate——

Q. Is it indicated on the letter of Mr. Stivers?

A. As I recall it was—oh, let me see. That was \$11,100. And it was increased to \$12,500.

Q. And the Insurance Company of the State of Pennsylvania?

A. The Insurance Company of the State of Pennsylvania was—let me see. I have that. That was \$7,620 in '49.

Q. And the Fulton Insurance Company was what?

A. The Fulton Insurance Company was \$5,080.

Q. Now, in the course of the telephone conversation [169] that you had with Stivers' office concerning the renewal of the Queen and the Insurance Company of the State of Pennsylvania policies, did the lady talking to you make any statement concerning the property being unoccupied?

A. I do not recall there was any statement made at the time. And we did not order it that way. So in all probability there was none.

Q. Now, subsequent to that conversation did you contact the Loyalty Group to renew the Insurance Company of Pennsylvania policy?

A. I didn't contact the Loyalty Group. I didn't have the coverage through the Loyalty Group.

(Testimony of Roy A. McMillan.)

Q. What did you do concerning placing the insurance with the Insurance Company of Pennsylvania?

A. Well, I advised the company that the policy was to be renewed, subject to a change in the amount.

Q. And what amount did you change it to?

A. In the Insurance Company of the State of Pennsylvania—let me see if I changed that. Yes. No. The Insurance Company of the State of Pennsylvania—let's see. '49. It was \$7,500 instead of \$7,620.

Q. And what did you state to the Insurance Company of Pennsylvania as to occupancy?

A. That according to my knowledge it is occupied; there were no changes in occupancy. [170]

Q. Now, with reference to the Queen Insurance Company, did you fill out a written application?

A. Yes, I did.

Q. And I show you a printed form of application for insurance. It has been inked in. Was that filled in by you? A. Yes, I did this myself.

Mr. Stump: Your Honor, I am going to object to this question and this line of questioning. The communications between Mr. McMillan and his companies are irrelevant to this matter here. Mr. McMillan is the agent of those companies. He is the one that procured and endorsed and signed and delivered these policies. What he wrote to his people to get the policies issued is merely self-serving and

(Testimony of Roy A. McMillan.)

hearsay as far as the issue in this lawsuit is concerned.

The Court: Well, I don't see any materiality in these other policies.

Mr. Castro: This is the renewal policy which was effective at the time of the fire.

The Court: The objection is overruled. I want to hear the facts.

Mr. Castro: May we have the question read back, your Honor?

The Court: Yes.

(Record read.)

Q. (By Mr. Castro): Does it bear your signature? [171] A. Yes.

Mr. Castro: I offer this in evidence at this time as Defendants' Exhibit next in order.

The Court: Read it so we can follow you.

Mr. Castro: "Application for Insurance.

"Agency: Roy A. McMillan.

"Company: Queen.

"Amount: \$12,500.

"Rate: \$278.47"

rate in 1949.

"Commission: 15 per cent.

"Insured: Morgan A. Stivers, dba Stivers Packing Company.

"Term: Three years from 12-1-52 to 12-1-55.

"Item 1: \$5,000 on frame building, occupied as packing house and loading platform.

(Testimony of Roy A. McMillan.)

“Item 2: \$5,000 on equipment pertaining to packing house and loading platform.

“Item 3: \$2,000 on field boxes and supplies.

“Item 4: \$500 on ‘D’ Class storage building.

“Total: \$12,500.

“Rate: Three years at \$278.47.

“Situated as Side Station three miles north of Lindsay, Tulare County, California.

“Mortgagee clause, loss payable clause, Farmers [172] & Merchants Bank of Long Beach, Third and Pine Streets, Long Beach, California.

“Clauses to be attached: No average clause.

“Signature: Roy A. McMillan.”

The Court: Is there any necessity of offering it in evidence as long as you have read it?

Mr. Castro: Thank you, your Honor.

Q. (By Mr. Castro): Now, were the policies then made out by the Insurance Company of Pennsylvania and the Queen Insurance Company forwarded to you? A. That's right.

Q. And then did you in turn countersign those policies and endorsements? A. I did.

Q. And were they as you ordered them?

A. Yes, they were as ordered.

Q. Then did you deliver them to Truman B. Stivers' office for delivery to the insured?

A. I either delivered them or mailed them. I don't now recall. I have delivered and mailed policies.

(Testimony of Roy A. McMillan.)

Q. At any time prior to this loss did you receive any objections as to the form of either of those policies——

A. No.

Q. ——the Queen or Insurance Company of the State of Pennsylvania, from Truman B. Stivers' office or from the [173] insured, Morgan B. Stivers?

A. No. There was one change on the policy. There was a change in the coverage rates. That is the only thing. Extended coverage endorsement decreased from 47 cents to 25 cents after the policy was written; a return premium of \$27.50 allowed. That is the only change that I recall being made on it.

Q. And was that at the request of the insured, or Truman B. Stivers, or from the company?

A. That is the result of the rating bureau checking rate. There was a rate change in there and the rating bureau found that they were entitled to a return.

Q. Was that a general rate reduction?

A. That's right.

Q. I show you the policy of the Insurance Company of the State of Pennsylvania, Exhibit No. 3 and the endorsement attached to it.

“Owing to a change in rates effective December 1st, 1952, rates and premiums are hereby changed by return or additional premiums as shown in rate in premium sections above.

“All other items and conditions of the policy remain the same.”

(Testimony of Roy A. McMillan.)

And it shows the old rate on the extended coverage as 47 cents and the new rate of 25 cents. [174]

A. That's right.

The Court: What do you mean by "extended" rate?

The Witness: Extended coverage rate for wind, storm and various other perils besides fire are covered.

Mr. Castro: Riot, civil commotion and things of that kind.

I believe those are all the questions I have on direct examination.

Cross-Examination

By Mr. Stump:

Q. What was the date of this change in the rate of the extended coverage, the endorsement to the policy, Mr. McMillan?

The Court: Doesn't that show on the policy itself?

The Witness: It shows on the policy. The rate on here was effective as of the effective date of the policy, 12-1-52. And this came out 12-29-52. That was the date of our——

Q. (By Mr. Stump): That rate was not known to you at the time the original policy was issued, but it was changed by an extended coverage endorsement?

A. The Pacific Fire Rating Bureau checks those rates and if they are in error, either too high or too low, we are notified.

(Testimony of Roy A. McMillan.)

Q. You have been in the insurance business for 28 years did you say?

A. Yes, sir, more or less. [175]

Q. And in your business you prepare endorsements to policies, do you?

A. Sometimes we do, and sometimes the company prepares them.

Q. You have authority to? A. Oh, yes.

Q. And you have authority to countersign conclusive contracts of insurance? A. Yes.

Q. And this application that was submitted by you which was read into evidence was signed by you, was it not?

A. Yes, this happened to be. We don't always send written applications on renewals. Lots of times we just have a little form sent from the company and we just renew as is; or we renew with the changes. But in this particular case, as the amounts were different from the previous policy, we sent a new application.

Q. Is it what you usually term an application, or is an application usually signed by the applicant, the insured?

A. No. We usually make up the application ourselves. The signatures of the insured are not required on our policies.

Q. The insured makes his application to you, the agent of the company, always, is that right?

A. Usually.

Q. And you considered the phone call from Tru-

(Testimony of Roy A. McMillan.)

man Stivers' [176] office as an oral application of the insured to you? A. That's right.

Q. In that connection Mr. Truman Stivers' office was a broker placing the insurance?

A. That's right. They were brokering through us.

Q. Now, is there any significance attached to the fact that the Fulton Insurance Company did not renew or continue its policy on this plant?

A. I don't recall what happened there at the time. I believe it was at the request of the Stivers just to renew \$20,000 instead of \$30,000 as we had before. I think it was \$30,000. But it was more. And they suggested that it be renewed in the other two companies. They didn't state what amounts. But we fixed the amounts.

I believe shortly after that the Fulton Insurance Company pulled out from this agency, and they are only writing Lloyd's business now. But I think at this time—no. They were still writing fire insurance.

Q. Now, you testified, I believe, that on March 1, 1950, a short-rate was cancelled. Is that right?

A. That was on the Travelers. That policy was cancelled after the policy was written. And I have the date. It was cancelled, short-rate, on March 1st. The policy went into effect December 1st. So three months after the policy was written, at the request of Stivers Packing Company, why, [177] the policy was cancelled.

Q. "Short-rate" means the full rate has not been earned, is that it?

(Testimony of Roy A. McMillan.)

A. No, no. It is a penalty cancellation which is charged to the assured when the cancellation is requested by them, as against a pro rata when the company cancels.

Q. At any time, Mr. McMillan, from the time of the issuance of the first policy until the fire were you ever notified by any of these companies that you write insurance for on the packing plant to cancel the Stivers policy?

A. No. I don't recall the companies asked to cancel.

Q. The companies never advised you that the insurance should be cancelled because the plant was not operating, or any other reason? A. No.

Mr. Stump: I have no further questions.

The Court: That is all.

Mr. Castro: The witness may be excused, your Honor?

The Court: Yes. This witness may be excused.

(Witness excused.)

The Court: This will be a good time to take our morning recess of five minutes.

How many more witnesses do you have?

Mr. Castro: Two short ones, your Honor.

(Short recess.) [178]

The Court: You may proceed.

DAVID A. HULL

called as a witness on behalf of the defendants, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: David A. Hull.

Direct Examination

By Mr. Castro:

Q. Where do you live, Mr. Hull?

A. Santa Monica.

Q. What is your occupation?

A. I am special agent and underwriter for the Fire Marine Department, Seeley Company.

Q. And what is the Seeley Company's relation to the defendant in this case, the Insurance Company of the State of Pennsylvania?

A. The Seeley Company are general managers for the Insurance Company of the State of Pennsylvania.

Q. Now, did you bring with you a copy of your daily records concerning the renewal of the insurance on the Stivers Brothers Packing House at Lindsay, California? A. I did.

Q. And did you receive any information from anyone that the packing house was not being occupied or operated as a citrus packing house? [179]

A. No.

Q. At the time you issued the policy?

A. No, I did not.

(Testimony of David A. Hull.)

Q. Was your first knowledge on that subject after the fire occurred in October, 1954?

A. That's right.

Mr. Castro: I believe those are all the questions I have.

The Court: Any cross-examination?

Mr. Stump: Just one moment, your Honor.

No cross-examination.

The Court: That is all.

(Witness excused.)

The Court: Call your next witness.

Mr. Castro: Mr. Hull may be excused then, your Honor?

The Court: Mr. Hull may be excused.

Mr. Castro: Thank you, Mr. Hull.

R. F. OWEN

called as a witness on behalf of the defendants, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: R. F. Owen, O-w-e-n.

Direct Examination

By Mr. Castro:

Q. Where do you live, Mr. Owen?

A. Beverly Hills. [180]

Q. What is your occupation?

A. Assistant regional manager, Royal Liverpool Group.

(Testimony of R. F. Owen.)

Q. And how long have you been in the insurance business? A. 34 years.

Q. Now, have you brought with you the underwriting file in regard to the Queen Insurance policy involved in this litigation? A. Yes.

Q. Did you receive a written application for the issuance of the policy which is involved in this fire? A. Yes.

Q. From whom was the written application received? A. Roy McMillan.

Mr. Castro: And for the purpose of the record, counsel, can we stipulate that is the application that has been read into evidence?

Mr. Stump: If you tell me it is, so stipulated.

Mr. Castro: Yes.

Q. (By Mr. Castro): Now, on what date was that received by the Royal Liverpool Group?

A. October 30th.

The Court: What year?

The Witness: 1952.

Q. (By Mr. Castro): Now, where was the policy issued? [181]

A. In our Los Angeles office.

Q. And was it then delivered to Mr. McMillan for his countersignature and delivery to the insured? A. Yes.

Q. Now, after the policy was issued was there any rate change concerning extended coverage endorsement? A. Yes.

The Court: Why are we interested in this?

(Testimony of R. F. Owen.)

Mr. Castro: Counsel raised it and I thought I would cover it. It is not material on the fire rate.

The Court: I don't know, but I understand that whenever they rerate a place if it's less rate, why, the agent has to make the refund and loses his commission on that portion.

Mr. Castro: That is correct, your Honor.

Those are all the questions I have of Mr. Owen.

The Court: Do you have any information whether this plant was being operated or not?

The Witness: No, sir.

Q. (By Mr. Castro): Did anybody indicate to you, to your Royal Liverpool Group, that the plant was not being operated as a citrus packing company? A. No, sir.

Q. Did you have any other information other than shown in the application of Roy H. McMillan?

A. No, sir. [182]

Mr. Castro: Those are all the questions I have.

Cross-Examination

By Mr. Stump:

Q. When you received the application, Mr. Owen, did you request that the Pacific Fire Rating Bureau make a rating on the building?

A. Our procedure in this is that the location of this risk is outside of our jurisdiction in Southern California, so we corresponded with our San Francisco office for the rate on this risk.

Q. And did you ask someone out of your office to make the rating? Is that correct?

(Testimony of R. F. Owen.)

A. The rate was furnished to us by our San Francisco office.

Q. And do you know where that rate was obtained? Or was it made by your San Francisco office?

A. I can just imagine it was obtained from the rating bureau.

The Court: You are a member of the rating bureau?

The Witness: Yes.

The Court: All your rates are fixed by them, are they not?

The Witness: Yes, sir.

Q. (By Mr. Stump): Do you know of your own knowledge whether such rates are based upon a personal inspection of [183] the premises?

The Court: How would he know in this particular case, counsel?

Mr. Stump: He wouldn't, your Honor, because he hasn't even testified that they rated it. He surmised that they rated it.

The Court: Now, how would he know whether a rating bureau would send a man down there to rate this plant?

Mr. Stump: He wouldn't know of his own knowledge, except as his being an expert in this field and an underwriter, he would know what was usually done. We would presume in this case it was done. I think it has been earlier testified that inspections were made by Mr. Baker. And, therefore,

I will not pursue the question because the man does not know.

That is all. I have no further questions.

Mr. Castro: May Mr. Owen be excused?

The Court: As far as the court is concerned.

Mr. Stump: Yes.

The Court: You may be excused.

(Witness excused.)

Mr. Castro: The defendants rest at this time, your Honor.

Mr. Stump: No rebuttal, your Honor.

The Court: Gentlemen, you have a lot of Doe defendants here. Do you move to dismiss them at this time? [184]

Mr. Stump: We move to dismiss the Doe defendants, your Honor.

The Court: Granted.

Well, gentlemen, I think we ought to try to see if we can't agree on what the facts are. I might state what appear to me to be the facts. And I might also state, in the first instance, that I haven't studied the policies. But to my understanding, for more than 10 months prior to the fire the plant had not been in operation as a packing plant. And, also, that there was a trailer occupied by a family living within 50 feet of the plant; that their obligation was to see that nobody entered the plant without the written permission of the plaintiff in this case. The occupants of the trailer occupied it for free rent but received no compensation for that service.

Now, I don't believe anybody specifically has tes-

tified to the fact, but I think that the inference can be drawn that it is true, that the agent who wrote the policy or took the order for the policy knew that the plant was not in operation.

Now, isn't that the sum and substance of the facts of the case, gentlemen?

Mr. Castro: Yes, your Honor.

Mr. Stump: That is correct, your Honor.

The Court: The legal question then comes up whether or not the agent who wrote the policies can bind the company. [185] And I want to say that my understanding is that he cannot. I had one case in which the court upheld me in holding that the company was estopped by the reason of the conduct of the agent as far as the fire losses are concerned. I have never run across a case yet, or had a case yet, or had a case where the company has been held liable or estopped by information that the agent who writes the policies has.

It seems to me that there are two questions in this case: first, whether or not the information of the agent who wrote the policies in this case acts as an estoppel insofar as the companies are concerned; and secondly, whether the occupancy of the premises by a trailer and a man and wife and son were such as to constitute an occupancy within the terms of the policy.

Aren't those the only two questions, gentlemen?

Mr. Castro: Yes, your Honor, as I see them.

Mr. Stump: Those are the two problems involved, whether or not there was a special signifi-

cance given to the term "occupancy" by the contracting parties here.

Mr. Castro: Counsel in his pleadings has described it as a waiver and not as an estoppel. Sometimes the court distinguishes between those two terms. Does your Honor use the term estoppel as phrased in the——

The Court: Well, as I told you before, I have not had an opportunity to study the pleadings, and I don't know [186] whether—it might be considered a waiver or estoppel, either way.

But we have a situation where the agent who wrote the policies, delivered them, which were in effect a contract with this particular provision in it.

Mr. Castro: The issues as you have stated them, your Honor, are the issues, I think as we defined them in our trial briefs.

Mr. Stump: That is correct.

Mr. Castro: We came down to that when we got through admitting back and forth, the whole question of occupancy and whether there had been a waiver as far as Truman B. Stivers was concerned.

The Court: Well, in a memorandum you filed you submitted authorities to the effect that the non-operation of the plant would be the same as "unoccupied."

Mr. Castro: Yes, your Honor.

The Court: Now, I think that's the main question in this case because there is no question that the plant was there ready for use. In fact, the evidence shows that there had been some work done

in the plant in preparation of a possible resumption of operations.

Mr. Castro: I would be happy to brief it as defined by your Honor here.

The Court: Gentlemen, isn't that really the question [187] that I have to pass upon? Isn't it really a question of law?

Mr. Stump: It is really a question of law, your Honor. I think that everyone, the court and counsel here, are in agreement that you have properly stated the issues. As far as I know there is nothing further to do except to present to your Honor the correct law on the subject.

The Court: I will allow each of you 10 days to file any memorandum and five days each to respond to the other's memorandum. The memorandum will be simultaneous.

The Clerk: Five days to reply?

The Court: Five days to reply.

Mr. Stump: May I inquire? Should we submit our memorandum to you, sir, in two copies or one?

The Court: What is the practice, Mr. Clerk?

The Clerk: All pleadings and briefs are in duplicate, according to the rules.

The Court: In duplicate.

Mr. Stump: Thank you.

The Court: If you file them directly with me I will get them quicker, and you will get a decision quicker, perhaps.

(Whereupon, the above-entitled matter was concluded.) [188]

Certificate

I, J. D. Ambrose, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 17th day of April, 1956.

/s/ J. D. AMBROSE,
Official Reporter.

/s/ DON P. CRAM,
Official Reporter.

[Endorsed]: Filed July 26, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 108, inclusive, contain the original

Petition;

Answer of Girard Insurance Co. of Philadelphia, Pennsylvania;

Answer of Queen Insurance Company of America;

Answer of Insurance Company of the State of Pennsylvania;

Answer of National American Insurance Company;

Stipulation to Amendment of Plf's Complaint and Defendants' Answer;

Plaintiff's Trial Memoranda in Compliance with Rule 12;

Defendants' Reply Trial Memoranda;

Memorandum of Opinion;

Findings of Fact & Conclusions of Law;

Judgment;

Notice of Appeal;

Designation of Contents of Record on Appeal;

Amendment to Designation of Contents of Record on Appeal;

Application for Extension of Time to Docket Record on Appeal, Affidavit and Order;

Stipulation for Release of Original Reporter's Transcript for Filing;

Bond for Costs on Appeal;

which, together with 1 volume of reporter's transcript of proceedings constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 8th day of August, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk,

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15230. United States Court of Appeals for the Ninth Circuit. Morgan Stivers, Appellant, vs. National American Insurance Company, a Corporation, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 10, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 15230

MORGAN A. STIVERS,

Appellant,

vs.

NATIONAL AMERICAN INSURANCE CO., a
Corporation, et al.,

Appellee.

STATEMENT OF THE POINTS ON WHICH
APPELLANT INTENDS TO RELY

1. The evidence is insufficient to support the Findings of Fact contained in the following paragraphs of said Findings of Fact:

IId, those portions of paragraphs IV, V, VI and VII dealing with agency relationship between plaintiff and Truman B. Stivers, X, XIV, XV, XVI, XVII and XVIII.

2. That the Conclusions of Law contained in paragraphs 1, 2, 3 and 4 are insupportable on the evidence and contrary to law.

3. That the Judgment is unsupported by the evidence and contrary to law.

Dated: August 20, 1956.

SIMPSON, WISE &
KILPATRICK;
HARWOOD STUMP and
HENRY T. LOGAN,

By /s/ GEORGE E. WISE.

Affidavit of service by mail attached.

[Endorsed]: Filed August 22, 1956.

No. 15230.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MORGAN STIVERS,

Appellant,

vs.

NATIONAL AMERICAN INSURANCE COMPANY, a Corpora-
tion, *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF.

SIMPSON, WISE & KILPATRICK,
HARWOOD STUMP, and
HENRY T. LOGAN,

By GEORGE E. WISE,
110 West Ocean Boulevard,
Long Beach 2, California,
Attorneys for Appellant.

FILED

JAN - 2 1957

PAUL P. O'BRIEN, CLERK

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No. 15230.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MORGAN STIVERS,

Appellant,

vs.

NATIONAL AMERICAN INSURANCE COMPANY, a Corporation,
et al.,

Appellees.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment for the defendants after court trial rendered in the United States District Court for the Southern District of California, before the Honorable Ben Harrison, Judge, in an action to recover for a fire loss on four policies of fire insurance issued by the four defendants. Jurisdiction of the cause below was founded on diversity of citizenship and amount in controversy, pursuant to 28 United States Code, Sections 1332-1441. The pleadings show plaintiff is a citizen of the State of California, and defendants are corporations organized under the laws of states other than California, and the matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars. [Tr. pp. 4, 8, 13, 17, 21, 22, 85.]

Statement of the Case.

Appellant, Morgan Stivers, was the sole owner of a packing house and other appurtenant buildings, together with machinery and equipment which was totally destroyed by fire on October 13, 1954. Each of the four appellees had issued fire policies which would cover a portion of the fire loss. However, appellees, who admit the loss and proof of loss under the policies in the amount of \$38,000.00 have denied liability on the sole ground of noncompliance by the assured with the following provisions contained in each policy (California standard form) and a rider thereto relating to occupancy:

Lines 28 to 34 of policies [Pltf. Exs. 1, 2, 3 and 4]:

“Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this company shall not be liable for a loss occurring . . . (b) While a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days”

Paragraph 21 of Building, Equipment and Stock Endorsement No. 78 also attached to each policy provided:

“Vacancy-Unoccupancy Clause: Permission is granted to remain vacant or unoccupied without limit of time, Except as Follows: . . . (2) If the subject of insurance (Whether building or contents or both) is a cannery, fruit, nut or vegetable packing or processing plant, fish reduction plant, hop kiln, rice drier, beet sugar factory, cotton gin, cotton press, or cotton seed oil mill, premission is granted (a) to remain vacant for not to exceed sixty (60) consecutive days, and (b) to remain unoccupied But Not Vacant for not to exceed ten (10) consecutive months”

Appellees' entire position is based upon the contention that the packing house was "unoccupied" for a period of more than ten months prior to the fire, and that they are thereby relieved of any obligation to pay according to the terms of the policy. Simply stated, we are here dealing with a "fine print" escape from a fire loss which the insured (who paid premiums exceeding \$1000.00 on the policies) had every right to expect was covered. If the insurers are correct, despite the payment of premiums and the good faith attempt of appellant to comply with policy terms as hereafter related, including the occupancy provisions, appellant was at no time covered by insurance during the almost two years the policies (which in bold print on the first pages insured against "all Loss BY FIRE") were in effect. We submit that the case is one in which the salutary rule of construction of insurance policies is particularly applicable, that since policies are drawn by the insurer, any doubts or ambiguities must be resolved in favor of the claimant. (*Bankers Life Co. v. Jacoby* (9th Cir.), 192 F. 2d 1011.)

Appellant urges that there are several separate and distinct grounds upon the basis of which the judgment below should be reversed: First, the insured premises were "occupied" at the time of the fire loss within the meaning of the policy provisions above referred to. The evidence hereinafter related at length shows that, for the purpose of satisfying the policy requirements, appellant had placed a family on the property which was residing thereon at the time of the fire. Furthermore, there was no express warranty by the insured that the plant would be in operation at any time, nor was there any express warranty respecting a watchman and the so-called "watchman endorsement" spelling out duties of a watchman was

not exacted by the insurers. Secondly, the evidence shows that appellees, through their agents, had knowledge of the fact that the plant was not packing fruit during the terms of the policies, and consented to "having someone living on the property" as compliance with the occupancy requirements.¹

Appellant's property here involved was located near Lindsay, in Tulare County, California. [Tr. p. 105.] The insured premises consisted of an orange packing house, bunk house, loading platform and a storage building, cull bin, and all of the equipment and machinery necessary to operate a packing house. [Tr. p. 109.]

No fruit had been packed on the property since 1949. [Tr. p. 110.] A couple of months before the fire, extensive repair work had been done on the packing house in preparation for future packing, including a new roof and repairs to the windows, floors, and conveyor belt. [Tr. pp. 120-121, 196.]

¹We do not wish to detract from our principal points above asserted, by pointing out a lesser but obvious error on the part of the trial court. But we may point out that in each policy, various items are separately insured (packing house and loading platform, equipment, stock (field supplies, and boxes) bunk house and storage platform) with separate amounts of insurance on each item. [Pltf. Exs. 1, 2, 3, and 4.] Only the packing house and loading platform are insured "while occupied as" such, with the occupancy provisions possibly applying to "equipment" also. As to "stock" and "storage building" there is no requirement whatsoever in the policies respecting "occupancy" [Pltf. Exs. 1, 2, 3, and 4.] Since the admitted damage on these items was \$7,500.00 [Tr. p. 79] the trial court should have allowed said amount to plaintiff apportioned in accordance with the terms of those policies covering the items, even if appellant were correct in asserting that the packing house was "unoccupied." And if equipment be added, the amount of this error, even accepting the trial court's reasoning, would be \$18,500.00.

Truman B. Stivers, nephew of the appellant, is an insurance agent licensed by the State of California, representing a number of companies including the defendant Girard Insurance Company of Philadelphia, Pennsylvania [see "Agency Agreement", Pltf. Ex. 6], and defendant National American Insurance Company. [Pltf. Ex. 5.] Truman B. Stivers had handled practically all of his uncle's insurance business for several years. [Tr. p. 122.] As an insurance agent, he countersigned policies and endorsements, and had authority to prepare policies, but as a matter of convenience the policies were prepared by the companies' offices. [Tr. pp. 175-176.]²

The four policies sued upon commenced on December 1, 1952, and were to expire on December 1, 1955. Three were renewal policies of policies originally issued in December, 1949, that of defendant Girard Insurance Company of Philadelphia (hereinafter referred to as "Girard"), that of defendant The Insurance Company of the State of Pennsylvania (hereinafter referred to as "Pennsylvania"), and Queen Insurance Company of America (hereinafter referred to as "Queen"). The fourth policy was a new policy, that of National American Insurance Company (hereinafter referred to as "National American").

Because of weather and economic conditions, no oranges had been picked since August of 1949 which was before the original policies went into effect, nor subse-

²In passing, it should be mentioned that it has not been contended nor is there any evidence that the placing of the insurance sued upon was anything other than an arm's length business transaction, and it would seem immaterial to any of the issues here raised whether the insured gave his insurance business to a relative, rather than another agent in whom he had confidence.

quent to the issuance of the policies sued upon up to the time of the fire on October 13, 1954. [Tr. pp. 118, 110.]

In October, 1952, Truman B. Stivers called the office of appellant and told him his insurance on the packing plant was coming up for renewal. [Tr. p. 113.] The plant was not then in operation as a fruit packing plant, but was occupied by the person living on the property. [Tr. p. 113.] At that time appellant advised Truman Stivers that he wanted \$40,000 coverage and also advised him that the packing house wasn't in operation. [Tr. p. 113.] The applications for insurance by appellant were oral, not written. [Tr. p. 178.]

Truman Stivers, through his office staff, then set about to place the insurance, and placed a portion of the coverage with the two companies for which he was agent, Girard and National American. The remaining policies were placed by Truman Stivers' office through another insurance agent, Roy A. McMillan, an agent for Queen and Pennsylvania, who had written the original policies with Queen and Pennsylvania. [Tr. pp. 241-242.]

Appellant had nothing to do with the selection of the companies or the apportionment of the coverage among the companies, which was handled through the insurance agents' offices.

In the first part of 1950, appellant had had a conversation with Truman Stivers about the packing house. At that time, appellant advised Truman Stivers that he didn't know whether he would ever operate the packing house anymore and Truman Stivers advised him that in order to keep the insurance in effect "you will have to keep someone on the property if it is not in operation." [Tr.

pp. 118-119.] From that time until the date of the fire appellant had someone living on the property at all times. [Tr. p. 119.]

Truman Stivers had property himself near Lindsay and was around the packing plant a number of times. [Tr. p. 115.] He testified that within a year after he wrote the first policy in 1949, he knew the plant was not operating. [Tr. p. 179.] He would make it a point to drive by the packing house to see that things were in order and found that people were living in the plant, occupying it, and if they had moved he would call it to the attention of appellant, who would see that somebody was located on the property. [Tr. p. 180.] He confirmed the conversations testified to by appellant as to occupancy, wherein Truman Stivers advised appellant "that unless he would keep somebody on the property his insurance would be in jeopardy—if it were vacant for a certain length of time he would be putting his insurance in jeopardy and he should try and keep somebody in there living on the premises." [Tr. p. 180.] The insurance agent "thought that 'occupancy' was people actually, physically living on the premises." [Tr. p. 181.]

Ruby Morris testified that she lived on the property with her husband and 16-year-old son from July 3, 1954, to the day after the fire. [Tr. pp. 221-222.] They lived in a trailer between the packing house and the bunk house about 50 feet from the packing house and 30 to 40 feet from the bunkhouse. [Tr. p. 222.] The arrangement of buildings on the property is shown on a sketch [Def't. Ex. I] and the location of the Morris trailer may be fixed therefrom. They had hot water in the bath, electricity and showers. [Tr. p. 222.] She further testified that one of the family were there all the time. They did

not perform any duties in relation to the packing house, "We just kept the people from going in, or anybody being around." With respect to whether someone ever tried to get in, "Well, they came and we would tell them we had no permission to let them go in and at one time they came and brought a note and they went in anyway, with us telling them; and my husband went in and brought them out and told them that unless Mr. Stivers came with them they were not to go in, that we had no permission to let anybody in." [Tr. pp. 222-223.] The Morrisises had no key to the packing house and didn't go in at all. Arrangements for their move onto the premises had been made with appellant's foreman who "wanted us to move there and watch the packing house. And he pulled the trailer there himself." [Tr. p. 223.] Appellant's foreman fixed the hot water and showers and lights. The Morrisises paid their own lights and appellant paid the rest, and the Morrisises got free rent. [Tr. p. 224.] Sometimes Mr. Morris worked and sometimes both husband and wife worked, and sometimes their son worked. [Tr. p. 224.] On the morning of the fire Mr. and Mrs. Morris went to work picking olives, and she believes her son worked that day. They went to work at about 5:00 A.M. and returned about 4:00 P.M., and by that time the fire had destroyed the packing house. [Tr. pp. 225-226.]

Appellant had informed his foreman who made the arrangements to have someone living on the property that there had to be someone on the property all the time and the foreman said one of the family was there at all times [Tr. p. 125], and appellant understood that that was the case. [Tr. p. 124.]

Appellees admitted loss and damage to the insured properties under the combined coverages of the policies, as

follows: Packing house, \$18,000; Equipment, \$12,500; Field boxes and supplies, \$5,000; and Storage Building, \$2,500; or a total of \$38,000. [Tr. p. 79.]

Specification of Errors.

1. Appellant urges that the insured premises were occupied at the time of the fire and that the insurance was not suspended and that the trial court erred in its findings to the contrary found in Paragraphs X, XIV, XV, XVI, XVII and XVIII of the Findings of Fact.

2. Appellant further urges that the trial court erred in finding that Truman B. Stivers, the insurance agent, was agent of appellant, rather than appellees, as found expressly or impliedly in Paragraphs II(d), IV, V, VI and VII of the Findings of Fact.

Preliminary Statement.

For clarification we may note the following propositions, for reference in this argument:

1. There is no contention that the premises here involved were "vacant"; that term is not synonymous with "unoccupied" but refers to the removal of the contents or inanimate objects from the insured premises. (See *Foley v. Sonoma County etc. Ins. Co.*, 18 Cal. 2d 232, 234.)

2. There is nothing inherently destructive of the relationship between insurer and insured in the fact of unoccupancy. Paragraph 21 of endorsement No. 78 of these policies referred to above, specifically grants permission to remain vacant or unoccupied without limit of time, except that certain specific types of buildings may remain unoccupied for not to exceed ten consecutive months. Thus

as to all insured items (1 to 5) on these policies [Pltf. Exs. 1, 2, 3, and 4] the prohibition against unoccupancy for more than ten consecutive months appears to be applicable only as to Item 1, the packing house and loading platform, and possibly Item 2, equipment, and the insurance on the remaining items would remain in full force and effect irrespective of occupancy. The provision thus differs in importance from conditions increasing the hazard and losses resulting from explosion or riot (see policies, lines 28-35), a factor to be considered in construing the policies.³

3. As the decisions hereinafter related show, the fact that the "occupier" was absent at the time of the fire, does not mean that the property was unoccupied.

4. If the Morrisises were negligent in not leaving one of the family on the property on the day the fire occurred, such engligence would not bar recovery on the part of the insured. Paragraph 23 of the Building Equipment and Stock endorsement No. 78 attached to each policy provided in part:

"This insurance shall not be prejudiced: (1) By any act or neglect of the owner of the building(s) if the

³It may also be noted that the subject of insurance described in Item 1 of each policy is a "packing house and loading platform," not a "fruit . . . packing plant." Strict construction would require the conclusion that since the packing plant was not in fact operating as a fruit packing plant at the time of the issuance of the policies, and it was not insured as such, the general provision of paragraph 21 of the policy endorsements governs, and "Permission is granted to remain vacant or unoccupied without limit of time . . ." [See, *e.g.*, Pltf. Ex. 1.] This may seem an extreme position, but is certainly no less extreme than the position sought to be maintained by appellees in asserting forfeiture.

Insured is not the owner thereof, or by any act or neglect of any occupant of the building(s) (other than the named Insured), when such act or neglect of the owner of occupant is not within the control of the named Insured. . . .”

That any negligence on the part of the persons employed to live on the property would not relieve the insurers of their contractual obligation to pay this loss is made clear by section 533 of the Insurance Code of the State of California, which provides:

“An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured’s agents or others.”

Also we point out here that the so-called “Watchman’s endorsement”, a standard form endorsement in the insurance industry which would require the watchman to punch a time clock, be there at all times and make certain rounds, was not exacted by the insurers. [Tr. p. 184.]

5. There was no express warranty contained in the policies either (a) that the plant would be kept in operation at any specific times or periods, or (b) that the persons occupying the property would perform certain duties or functions.

ARGUMENT.

I.

The Insured Premises Were Not "Unoccupied" at the Time of the Fire.

Appellant challenges the findings of the trial court that the insurance was suspended by reason of the unoccupancy of the subjects of insurance for more than ten consecutive months, and that the premises were not occupied as contemplated by appellant and appellees under the insurance contracts for more than ten months prior to the fire.

Appellant has researched the questions involved both in California and elsewhere for decisions having factual parallels and finds that over the years the problems are recurring. Many deal with an express warranty by the insured (not here present) to maintain a watchman, and even in such cases the courts have generally, with few exceptions, taken a liberal attitude toward affording coverage to the insured who in good faith seeks to comply with the specific and multitudinous provisions of the policy.

A. Meaning of Unoccupancy.

The principles here applicable are discussed at length in *Silver v. London Assurance Corp.*, 61 Wash. 593, 112 Pac. 666 (1911).

In that case the policy contained a provision that the policy was void if the property became vacant or unoccupied and remained so for ten days. The court affirmed judgment for the plaintiff assured, holding that there was evidence which warranted the jury in concluding that both insured buildings were occupied at the time of the fire.

The policy insured two one-story frame buildings, each occupied as a saloon. A witness testified that he had rented one of the buildings for a saloon a week before the fire and had actually made some sales on Saturday before the Monday on which the fire occurred.

The sheriff had possession of the other building under legal process and had put a watchman in possession. The watchman had testified that he had charge of the building and was watching the building as late as the 6th or 7th of June which would be less than 10 days before the fire. The court said at page 668 of 112 Pac.:

“The appellant, however, contends that, if the watchman was in charge of the building within ten days before the date of the fire, his possession was not such an occupancy as the contract and the law contemplates. The language of the policy, which is the same as to both buildings, is ‘\$650.00 on the one-story frame building occupied as a saloon.’ It is said that the word ‘occupied’ should be given its ordinary and popular meaning, and, as applied to this building, means such occupancy as ordinarily attends or is exercised over a saloon building while being used as such. The vice of this position is that the policy does not provide that the building shall be devoted to saloon purposes. The words ‘occupied as a saloon’ are words of description only. As was said in *Burlington Insurance Company v. Brockway*, 138 Ill. 644, 28 N. E. 799: ‘If the company desired to make its liability contingent upon the continued occupancy of the house as a dwelling, it would have been very easy and natural to have stated that among the other conditions expressed.’ In that case the policy in describing the property insured used the words, ‘on the two-story shingle-roof frame building while occupied by assured as a store and dwelling house.’ Some

weeks before the fire, the building was abandoned as a dwelling, but continued to be occupied as a store until it burned. The policy provided, as in this case, that it should be void 'if the premises hereby insured are or shall hereafter become vacant or unoccupied,' without notice, consent, etc. It was contended that the company undertook to insure the building only so long as it continued to be occupied both as a store and a dwelling, and in meeting this contention the court said that a provision in a policy will not be construed to be a continuing warranty unless expressed in apt words. In *Doud v. Citizens' Insurance Company*, 141 Pa. 47, 21 Atl. 505, 23 Am. St. Rep. 263, the tenant moved out of the house on Tuesday, the owner went to the house and stayed during Wednesday, placed a man in charge, went to her home and packed on Thursday preparatory to moving into the house on Friday, and was prevented from doing so by the burning of the house on that day. Her offer to prove that she put a man in charge of the house on Wednesday, to remain until Friday, was denied. This was held to be error. See also, *Traders Insurance Company v. Race* (Ill.), 29 N. E. 846; *Stensgaard, etc. v. National Fire Insurance Company*, 36 Minn. 181, 30 N. W. 468; *Shackleton v. Sun Fire Office*, 55 Mich. 288, 21 N. W. 343, 54 Am. Rep. 379; *German Insurance Company v. Davis*, 40 Neb. 700, 59 N. W. 698. In the *Shackleton* case a watchman or overseer was in charge of the building when the fire occurred. This was deemed a sufficient occupancy. The appellant has cited a number of cases which, it contends, show that the possession of the watchman was not an occupancy within the meaning of the policy. There is a conflict in the authorities, and any attempt to harmonize them would be futile. However, the facts in the cases cited differ so materially from the facts here that it may be said

that they state no more than general principles. Each case must be determined largely upon its own peculiar facts. Viewing the case from the standpoint of the object to be obtained, viz., to guard against an increase of hazard, caused by nonoccupancy, it would seem to be a common sense view that the possession of a watchman, acting under a sheriff under legal process, would be such an occupancy as would satisfy the burden imposed by the policy upon the insured. The burden of proving that the buildings were unoccupied was upon the appellant."

In considering that opinion we may note that: (1) here, as there, there was no continuing warranty by the insured that the packing house would be operated at all times at the risk of suspension of the policy; (2) that many cases are cited showing that putting someone in charge of the premises suffices as occupancy even where the property is not being used or operated at the time of the fire for the purposes for which it was intended; (3) the common sense approach to the object to be attained, to guard against increase in hazard, is satisfied by having the premises occupied by a family whose residence thereon negates abandonment and who may, as did the Morriszes, watch over the premises and turn away trespassers.

Two factors relied upon by the trial court herein are the facts that the Morriszes did not have a key to the buildings and that none of the family was present at the time of the fire.

A decision in a situation very close factually to this action is *Home Ins. Co. v. Hancock*, 106 Tenn. 513, 62 S. W. 145.

In that case the policy of insurance insured a country dwelling house, including the household furniture, which was subsequently destroyed by fire.

It was insisted that the insurance had been forfeited on the grounds that the premises at the time of the fire were "vacant, unoccupied, and uninhabited" in violation of the conditions of the policy.

The Tennessee Supreme Court stated at 62 S. W. 145, 146:

"The proof shows that the insured, when he applied for the insurance, told the agent that he and his family would not be in that house all the time; whereupon the agent asked him if there would be some one in the yard, and he (insured) told him there would be a man in the house, and the agent replied that would be all right. We think it obvious, from this statement, that the agent would have been satisfied to have an occupant of the tenant's room in the yard, and did not intend to demand that some one should actually reside in the house. However, the proof is that plaintiff and his family moved out of the house, and went to Wilson County, where he cultivated a farm. He left a tenant or cropper in charge of the farm in Rutherford county, but would return 'sometimes twice a week, sometimes once a week, and sometimes he would miss a week.' All of the furniture and household goods, excepting two or three articles, remained in the building. The proof is that at the time of the insurance there were two small rooms in the yard situated about 36 feet from the dwelling house. These rooms were occupied by a tenant and his family. About the 20th of December, before the fire occurred, this tenant commenced to sleep in one of the rooms of the dwelling house. On the night the fire occurred, to wit, March 24, 1900, this tenant, his wife, and a visitor were sitting in the tenant's house. The fire occurred about 25 minutes to 11 o'clock, and when first discovered

it was on top of the house at the east side. The proof shows that no one had been in the dwelling house for a week. The tenant had access to one room only, and no keys to any other part of the house. The question then presented upon these facts is whether the insured dwelling house was unoccupied in such a sense as to avoid the policy. We think not. In the first place, the agent who took the application was informed that insured expected to leave the premises. This agent inquired if there would be some one in the yard; thereby intimating that this would be sufficient. But the insured stated there would be a man in the house. To this arrangement, the agent assented, saying, 'All right.' Now, the proof shows that from December 20th the tenant had been sleeping in one of the rooms of this dwelling, and that on the night of the fire he was sitting in the tenant's room, only 30 feet away. The object of having some one on the premises is to keep out trespassers, prevent incendiarism, as well as to maintain supervision over the property. The proof is clear that no one had entered these premises, nor is there a suggestion that the fire was of incendiary origin. It could have arisen from spontaneous combustion, or possible the ignition of matches by rats or mice. But it is insisted that this tenant, having no keys or access to the other rooms, was powerless to reach the fire when discovered. No authority has been furnished where this exact point has been decided. . . . Yet, as a practical matter, we are not prepared to hold that a man who has left an occupant of a single room to watch his house must leave with him the keys to his entire premises. This is frequently impracticable and undesirable, and such a rule would result in much injustice to policy holders. In the present case all that was contemplated between

the parties was that some one should sleep in this dwelling house and maintain a watch over the premises. There was a reasonable compliance on the part of the insured with this understanding. . . .”

In this case as in the *Home Insurance Co.* case, there is no evidence or suggestion that the fire resulted from incendiarism. Defendants were prepared to call a witness to the fire but the progress of the fire was stipulated to. [Tr. pp. 226-227.] There was here evidence that the Morrises were strict in keeping unauthorized persons off the premises and generally watched over the property. That case also points up that it may be impracticable and undesirable to leave the keys to the entire premises with the occupier; that would be so particularly where valuable equipment was in the packing house and access thereto was not essential to the Morrises' living accommodations.

On the second point emphasized by the trial court, the absence of the Morrises at the time of the fire and that they sometimes all three worked, there is a great deal of authority to the effect that the temporary absence of an occupier or watchman does not preclude recovery.

Foley v. Sonoma County, etc. Ins. Co., 18 Cal. 2d 232, dealt with the problem of temporary absence with respect to a dwelling and held that the absence of the owners on a trip for 13 days did not render the premises unoccupied, there being an intention to return, and the insurer could not escape liability under a clause authorizing unoccupancy for ten days only. The Morrises occupied the property here in question and their temporary absence at work did not render the premises unoccupied.

The same conclusion was reached in *Covey v. National Union Fire Ins. Co.*, 31 Cal. App. 579, where the tenant

had moved out, but had the intention of returning to get his remaining personal property, and was not present at the time of the fire.

In *Sierra M. S. & M. Co. v. Hartford Fire Ins. Co.*, 76 Cal. 235, there was an express warranty upon the part of the insured to employ a day and night watchman on the insured mill premises. The defendant insurer sought to avoid liability on the ground that at the time of the fire the watchman was not in the mill building, but was at a blacksmith shop about 65' from the mill.

The California Supreme Court declared at page 237:

“To us this seems to be nothing more than an allegation of negligence upon the part of the watchman, and for this plaintiff was not responsible under section 2629 of the Civil Code.” (Now Sec. 533 of the Insurance Code, quoted above.)

See 5 Appleman, *Insurance Law and Practice*, Sec. 3008 (Temporary Absence of Watchman.)

We submit that the evidence undisputably shows that (1) the insured property was occupied at the time of the fire within the meaning of that word found in the cases. Appellant did not warrant that the packing house would be kept in operation and in good faith complied with the occupancy provision of the policies. His understanding and that of the insurance agent that placing someone on the property to live there complied with the policy terms is confirmed by the authorities as correct. The fact that the Morrisises were absent at the time of the fire and may have been absent at other times, does not detract from the undisputed fact that they were physically residing on the property, and that the hazards were thereby reduced.

II.

If, in Absence of Agreement as to Occupancy Appellant Could Not Recover, the Evidence Shows Compliance With Agreement by Insured With Insurers.

We think the premises were not “unoccupied” within the meaning of the policies of insurance, in view of the well-defined meaning of that term elucidated by the authorities above cited. We believe, therefore, that it will not be necessary to determine whether there was an agreement between insured and insurers as to occupancy. Should the court feel, however, that, apart from any such agreement, the premises would have to be considered unoccupied, then it is necessary to examine into the circumstances of the agency relationship of Truman Stivers to the appellee companies and the knowledge of the situation at the plant and the communication of it to the companies.

We have already discussed the circumstances of the discussions between the insurance agent Truman Stivers and appellant which resulted in appellant placing a family to live upon the property. There can be no question of Truman Stivers’ consent to this as occupancy, for the record reflects the proposal as made by Truman Stivers and numerous occasions on visits by him to the insured property to confirm that his advice was being carried out and his obvious satisfaction with appellant’s performance.

We here deal with the following problems: (1) Were Truman Stivers and Ray McMillan the agents of appellees, and if so, was knowledge on their part that the plant was inoperative, if that be pertinent, knowledge to the companies; (2) assuming that it was, if the court should

hold the plant was “unoccupied” at the time the policies were issued, did such knowledge effect a waiver of any obligation of occupancy; (3) Did the express understanding or agreement between Truman Stivers and appellant as to occupancy waive appellees’ rights if any to require some other type of occupancy, or estop them from urging otherwise; (4) Are the appellees Girard and National American bound by the construction placed on the occupancy provisions by their insurance agent Truman Stivers, and appellees Queen and Pennsylvania by the acceptance of such situation by their insurance agent, Ray McMillan; (5) May permission affecting the policy or waiver of its provisions be effected by the insurance agents, by oral agreement or understanding, despite the customary provision contained in these policies requiring a writing.

We are here led into a labyrinth of intra-office and inter-office insurance dealings. As has been stated, appellant orally requested \$40,000 fire insurance, and had no more to do with the obtaining of coverage except that he and his office communicated to the insurance office staff of Truman Stivers and the latter himself, that a man would be living on the property in order to effectuate the insurance. In turn, this information was passed on to Ray McMillan, agent for Queen and Pennsylvania. (In fairness it should be stated there is a conflict in the evidence on this.)

A. Truman Stivers Was Agent for Appellees Girard and National American.

The trial court found that Truman B. Stivers was licensed by the State of California as an insurance agent and was an agent of defendants National American and

Girard in Pasadena, California. [Tr. p. 86.] The trial court further found, however, that in the handling of the insurance involved, Truman B. Stivers acted as agent of appellant, impliedly finding that he was not the agent of appellees, National American and Girard, in placing the insurance. [Tr. pp. 86-89.]

These findings were apparently based upon the testimony of appellant on cross-examination that Truman Stivers wrote practically all of his insurance:

“Q. And he acted as an agent for you, did he, in taking care of your insurance? A. Yes.” [Tr. p. 122.]

Appellees cannot avert responsibility for the statements or acts of their formally appointed agent in the insurance business, by asking a layman if the agent was his insurance agent. The court could undoubtedly take judicial notice of the fact that the layman customarily regards the person to whom he entrusts his insurance business as “my agent,” or “my insurance agent.” Nevertheless, it is not necessary to rely upon judicial notice, for the evidence clearly shows Truman Stivers was agent for Girard and National American.

Truman Stivers has been a licensed insurance agent since 1948. [Tr. p. 172.] He represents various companies and represented appellee Girard in 1949 and in 1952 at the time the policies sued upon were issued and represented National American at that time also. [Tr. pp. 172-173.] He had a letter of authorization dated 1951, from appellee, National American, granting him “full powers to act for” the company [Pltf. Ex. 5] which was his appointment as agent for that company. [Tr. p. 174.] Likewise, from September of 1948 he had had

an agency agreement to act as agent for Girard as principal, with "full power and authority to receive and accept proposals for insurance." [Pltf. Ex. 6.]

Truman Stivers testified that at the time of issuing the policies in 1952 he was operating under these written instructions. As agent he countersigned policies, executed endorsements, and kept a supply of endorsements at his office, and had authority to prepare policies, although for convenience the policies were prepared by the companys' office force. [Tr. pp. 175-176.] He had written other insurance for appellant and on many occasions had advised appellant that he was insured from the moment appellant requested him to issue insurance. [Tr. p. 176.] In this instance, the policies and endorsements were prepared at the offices of Girard and National American and transmitted to Truman Stivers' office to be countersigned by him. [Tr. pp. 136-137.] There was no testimony to the contrary respecting Truman Stivers' agency with Girard and National American or the scope of his authority.

Under these circumstances, and in view of the fact that the usual business routine of Truman Stivers' office was followed as with all his insurance clients, Truman Stivers was the agent of Girard and National American, and not of the insured, with authority to enter into an agreement or to make representations which would be binding on his principals. An insurance agent is defined in the Insurance Code of California, Section 31, as "a person authorized by and on behalf of an insurer, to transact insurance." Truman Stivers was so authorized by Girard and National American.

B. The Procedure Followed in Placing the Insurance.

In October, 1954, appellant had talked with Truman Stivers and requested \$40,000 coverage. [Tr. p. 113.] About the same time, that is about 60 days before the expiration date of the policies in effect, and in accordance with office practice, the general office manager of Truman Stivers' insurance office in Pasadena, contacted the insured's office for renewals. Truman Stivers' office manager, Mrs. Dynes, talked with Mrs. Zimmerman of appellant's office, and the latter advised they would like \$40,000 insurance. [Tr. p. 132.] Mrs. Dynes testified she advised Mrs. Zimmerman that to keep the insurance effective someone had to be living on the premises and Mrs. Zimmerman said they would have someone living on the property at all times. [Tr. p. 134.]

The office manager for appellant, Mrs. Zimmerman, confirmed this conversation with Truman Stivers' office manager and testified Mrs. Dynes told her "with regard to placing the policies on the packing house, that in case of fire, since the plant was non-operating, that it would be necessary for us to put someone on the property, to live on the property. . . ." [Tr. p. 147.] After discussing her memorandum of the conversation with appellant, Mrs. Zimmerman called Mrs. Dynes back and advised her that appellant wanted to place the insurance in the amount of \$40,000, "and that the people would be put on the place, on the property." [Tr. p. 148.] Appellant's office manager was informed by the insurance agent's manager that the rates would be higher because the plant was not in operation. [Tr. pp. 148, 151.] Mrs. Zimmerman couldn't remember whether the word "watchman" was used in these conversations but she wrote that word down in her memorandum book. [Tr. p. 150.] As she

understood “the requirements were that there would be someone living on the property. . . .” [Tr. p. 151.] Mrs. Dynes was not familiar with the “watchman’s” endorsement at the time the policies were written [Tr. p. 137] and of course that provision or requirement was not included in the policies.

After these conversations with appellant’s office manager, Mrs. Dynes turned the matter over to Mrs. Heysler, the insurance agent’s office secretary, to get the policies issued. [Tr. p. 134.]

The National American and Girard policies were written at the companies’ offices and forwarded to Truman Stivers’ office so that he could countersign the policies and the endorsements and deliver them to the appellant. [Tr. p. 137.] Mrs. Heysler signed Truman Stivers name to the policies and they were then sent to appellant together with the premium bill which was thereafter paid. [Tr. p. 138.] Mrs. Dynes and Mrs. Heysler were authorized to act for Truman Stivers and had authority to countersign the policies and mail them to the insured. [Tr. pp. 182-183.] Truman Stivers doesn’t recall personally seeing the policies. [Tr. p. 183.]

Mrs. Heysler, Truman Stivers’ office secretary, who actually handled the placing of the insurance with the four appellees was instructed by Mrs. Dynes and Truman Stivers to call various companies to see if they would carry it and at what rates. [Tr. p. 154.] The reason why all the insurance was not on one policy was that:

“On a large amount of insurance, even on large commercial buildings, insurance companies do not like to accept the full responsibility. They like to place it in various companies so that one company does not suffer the whole loss.” [Tr. pp. 138-139.]

Mrs. Heysler first called National American to obtain rates. She talked to the rate clerk, described the plant and how much coverage was wanted. [Tr. p. 155.] She then called Girard, and like National American, they would only take \$10,000 of the coverage and it was necessary to find a company that would take the rest of it. [Tr. p. 156.] For that purpose she called Roy McMillan, another insurance agent. [Tr. p. 156.]

Mrs. Heysler told McMillan in the phone conversation that the policies were expiring and asked if they would renew. McMillan asked various questions and asked if the plant were operating. Mrs. Heysler stated she didn't know, but Neil Stivers happened to be in the back office so she asked McMillan to wait while she inquired of Neil Stivers. [Tr. p. 157.] Neil Stivers told her the plant was not operating and followed Mrs. Heysler to the front office where she was talking to McMillan on the phone.

Mrs. Heysler told McMillan that the plant wasn't operating at this time but that Neil Stivers had told her that they were putting a man in living quarters behind the plant "so they could more or less keep his eye on it at all times." [Tr. p. 158.] McMillan said he would look into it and find out if the companies would renew and for how much. [Tr. p. 158.] Later McMillan called back and said he could get \$20,000 "so we told him to place it." Subsequently, the Queen and Pennsylvania policies were sent from McMillan's office to Truman Stivers' office. The policies and bills were mailed to appellant. [Tr. pp. 161-162.]

The notes made by Mrs. Heysler at the time of her phone conversation with McMillan showed that she wrote at that time ("going to put a man in"). [Deft. Ex.

“A,” incorrectly reported in transcript as “going to put Ahmanson in”; Tr. p. 168.]

McMillan recalled that a lady in the office of Truman Stivers had called him concerning the policies and testified “It would be pretty hard to do [state the conversation] at this time.” [Tr. p. 242.] Appellee’s counsel asked McMillan whether the lady from Truman Stivers’ office made any statement concerning the property being unoccupied” and McMillan stated: “I do not recall there was any statement made at the time. And we did not order it that way. So in all probability there was none.” [Tr. p. 243.] In view of McMillan’s hazy recollection of the conversation, even as to who had called him, and Mrs. Heysler’s clear recollection thereof, corroborated by notations in her memoranda which defendants offered in evidence [Deft. Ex. “A”] we believe the only clear inference is that the information about having some one living on the property in lieu of operating was communicated to McMillan.

McMillan has been in the insurance business 28 years. He sometimes prepares policy endorsements and sometimes the company does. He has authority to do so, and also authority to countersign conclusive contracts of insurance. [Tr. p. 249.] He was an agent for appellees, Queen and Pennsylvania, and obtained original coverage on the property involved in 1949 with various companies. [Tr. pp. 241-242.]

Appellees called various witnesses from the companies to testify that the insurance was accepted and the rates fixed on the basis that the premises were “occupied” [Tr. pp. 207-219, 228-256] or to testify as to lack of knowledge on the part of the witness that the plant was not operating, [Tr. pp. 252-255.]

There was an indication that sometime between November 28, 1952, and May 23, 1953, an actual inspection of the premises was made by the Pacific Fire Rating Bureau from which all of the appellee companies obtain their rates. On the former date Donald, chief underwriter of H. A. Ahmanson & Company, the general agents for National American, had written Pacific Fire Rating Bureau in San Francisco, asking them to inspect the premises and they did so, subsequently publishing rates on May 22, 1953. [Tr. pp. 237-238.] It is the customary practice of the Pacific Fire Rating Bureau to send a form letter stating what they found which was not in accordance with the company's application. In this instance no such letter was sent reporting any difference in the property as inspected from the property as reported in the application. [Tr. p. 239.]

C. The Companies Were Bound by the Knowledge and Agreements of Their Agents.

Certain principles applicable to the facts above related may be derived from the authorities:

(1) A local agent (such as Truman Stivers and Roy McMillan) who has full power to consummate contracts by countersigning and delivering the same, has authority to bind his principal to an oral agreement or waiver made by him, irrespective of a provision of the policy that any waiver or permission must be in writing.

The leading California decision frequently cited on the authority of a local agent for an insurance company is *Farnum v. Phoenix Ins. Co.*, 83 Cal. 247. In holding that the insured was covered by insurance despite the fact that the premium therefor was not actually paid before the

loss and the agreement by the agent to extend credit was not endorsed upon the policy, the California Supreme Court said at page 254:

“In this case the local agent of defendant at Stockton had unquestionable power to extend a credit upon the premium for the period of at least 60 days. He represented the full power of the company to make a consummated and binding contract of insurance by counter-signing and delivering the policy; and when he countersigned and delivered it unconditionally as a completed contract, under a specific agreement for payment of the premium at a future date, he thereby waived, to the full extent to which the company itself could then have waived, the actual payment of the premium as a condition precedent to its liability on the policy. ‘An insurance agent clothed with authority to make contracts of insurance or to issue policies stands in the stead of the company to the assured.’ (*Ricard v. Queen’s Ins. Co.*, 62 Miss. 728.)”

At page 256, the court said:

“Whether an agent has general or only particular powers is not determined by simply calling him a local agent (*Murphy v. Southern L. Ins. Co.*, 3 Baxt. 448; 27 Am. Rep. 761). An agent who under general instruction from the home office has authority within a certain territory to deliver policies and receive premiums is a general agent, and has authority to waive cash payment. (*Southern Life Ins. Co. v. Booker*, 9 Heisk. 606; 24 Am. Dec. 344.) A local insurance agent is presumed to have power co-extensive with the business entrusted to his care, and his powers will not be narrowed by limitations not communicated to the person with whom he deals. (*Bauble v. Aetna Ins. Co.*, 2 Dill. 156.) Where by the

terms of a policy a particular local agent is to countersign it to make it valid, so that the insured must deal with him, and no one else, he represents the power of the company, so that any policy which he countersigns binds the company to any person insured through his agency who has no notice of limitation of his power, though he may have exceeded his authority and violated his duty to his principal. (Citing cases.)

“A local agent having ostensible general authority to solicit applications and make contracts for insurance, and to receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority, notwithstanding an actual excess of authority. (Citing cases.)”

As to agreements made at the inception of the policy and knowledge at the time of inception on the part of the company's agent, the Court said at page 260:

“And it has been repeatedly held that where any fact which would constitute a breach of a condition precedent to any liability of the company on the policy is fully known to an agent of the company, local or general, who was authorized to consummate the contract of insurance, the knowledge of such agent is the knowledge of the company, and his act in executing and delivering the policy as a valid and completed contract is an exercise of the power of the company, and constitutes a waiver by the company of such condition precedent, and also a waiver of the general requirement that waivers of conditions expressed in the policy shall be in writing endorsed on the policy. (Citing cases.) It is also well settled that an insurance company cannot so limit its capacity to contract by general stipulation as against waiver of conditions, or that its contracts

or waivers must be in writing, that it cannot by its agents make an oral contract or an oral waiver not forbidden by the statute of frauds. (Citing cases.)

“Whether or not any particular agent has the general power of the company to make an oral contract or an oral waiver of a condition, notwithstanding the provision in the policy requiring a writing, is a question of fact. (Citing cases.)

“The authorities before cited show that a local agent who is clothed with general power to solicit and consummate contracts of insurance within a certain territory stands in the stead of the company, and represents its whole power to give validity to the contract which he is authorized to execute and deliver, and to waive conditions precedent to liability by oral agreement, including the condition *as to the mode of waiver* of such conditions precedent. In this case, the circumstance that the company had general agents for the state located at San Francisco does not affect the question, since it conferred its whole power in regard to the policy in question upon its agent at Stockton, who appears to have received his appointment and instructions directly from the home office, in the State of New York, and who signed himself as the direct agent of the defendant. Of the authorities hereinbefore cited, the following directly affirm the ostensible power of such a local agent to bind the company by waiver of any condition precedent to its liability, and to dispense with the requirement that such waiver shall be in writing endorsed upon the policy, so far as to estop the company from questioning its original liability on the ground that the waiver made at the time of delivery of the policy was not indorsed upon it. (Citing cases.)”

In numerous decisions following the *Farnham* case, the same principles have been affirmed. In *Bank of Anderson v. Home Ins. Co.*, 14 Cal. App. 208, the local agent was held to have power to bind the company by oral contract or waiver despite an express provision in the insurance contract against such waiver unless endorsed on the policy in writing. The agent had been told that the insured had obtained an additional policy but the agent neglected to note that fact on the policy as required by its terms. The Court said at page 214:

“It is admitted that no agreement permitting the subsequent insurance nor any waiver of said provision was indorsed on said policy, and that circumstance presents the second question raised by appellant. Notwithstanding, however, the unequivocal and exacting terms of said provision, it is settled by the decisions beyond controversy that the insurer may be bound by the waiver of a general agent, although no indorsement whatever is made upon the policy.”

The court cited and quoted from *Arnold v. American Ins. Co.*, 148 Cal. 660; *Mackintosh v. Agricultural Fire Ins. Co.*, 150 Cal. 440; and *Raulet v. Northwestern Etc. Ins. Co.*, 157 Cal. 213, and stated:

“The evidence shows that the agent, Mr. Barkuloo, was clothed with authority to waive said condition and stipulation and that his conduct and declarations must be regarded as a waiver of the same. He testified that ‘As agent for the Home Insurance Company I issued policies, cancelled policies, indorsed policies, issued and delivered policies, solicited and wrote insurance, collected the premiums for the company, remitted them to the company, and attended to the business of the company generally.’ There is no evidence to the contrary. If the foregoing powers

did not constitute him a general agent in that community it is difficult to conceive what additional authority is required for said purpose. 'Agents authorized to issue and deliver policies are regarded as having the same power to waive conditions in policies as the company themselves, and can therefore waive conditions and forfeitures.' "

To the same effect was *Kazanteno v. Cal-Western etc. Ins. Co.*, 137 Cal. App. 2d 361, where the insured under an accident policy relied upon an oral conversation with the insurance agent wherein the latter said "everything was all right," even though an application for increased insurance had not been received by the company from the agent until after insured was injured. The court relied on the established principle that oral agreements for insurance are valid in California as are oral agreements respecting all phases of insurance contracts, and that the local agent had ostensible or actual authority to make an oral agreement as a representative of the Company.

And in *Chase v. National Indemnity Co.*, 129 Cal. App. 2d 853, the local agent at Oxnard was held to be a general agent for the insuring company with authority to waive conditions in an insurance policy by mere parol, even though the policy required waivers to be in writing.

See *Eagle Indemnity Co. v. Industrial Acc. Com.*, 92 Cal. App. 2d 222. (Knowledge of agent that deceased pilot killed in airplane crash was to be included in persons covered by compensation policy, held to bind company and permit reformation of policy to include pilot.)

And in *Arnold v. American Ins. Co.*, 148 Cal. 660, the knowledge of an insurance adjuster for defendant

company that gasoline was kept on the insured premises was held to defeat the insurer's contention that the policy was voided because of a provision that the policy was void if petroleum were kept on the premises. The printed stipulation against waiver except by writing was considered "not . . . at all material" and did not prevent the conduct of the officers of the company from constituting a waiver or estoppel on the company.

See:

14 *Cal. Jur.*, Sec. 84, p. 526;

17 Appleman, Insurance Law and Practice, Sec. 9603, p. 303, Sec. 9604.

(2) The contemporaneous and practical construction of a term of the policy by the insurance agent and the insured are strong evidence of its meaning and the agent's construction is binding upon the company.

In *Raulet v. Northwestern Ins. Co.*, 157 Cal. 213, 223, 224, a question was raised as to whether credit for the unpaid premium had been extended by the insurance agent. The court said at page 223:

"But, as pointed out by respondent, the phrase 'in consideration of twenty-four dollars premium' involves a latent ambiguity. It is manifest that it may be construed as indicating payment or the promise of payment of the premium as the consideration. Hence it was proper for the court to consider the conduct of the parties as indicative of their understanding of this provision. 'The contemporaneous and practical construction of a contract by the parties is strong evidence as to its meaning if its terms are equivocal.' (*Keith v. Electrical Eng. Co.*, 136 Cal. 181.) If plaintiff had understood payment to be the consideration and had intended to rely upon it

there would have been no such unconditional delivery of the policy without prepayment. From this latter circumstance the court was justified in concluding that the defendant extended credit, as within common knowledge is usually done in favor of responsible parties. To the aid of the court's finding may be summoned, also, the rule of construction generally recognized and well established that 'every indulgence not inconsistent with the plain meaning of the contract must be shown the assurer.' "

At page 233, the court said:

"As to the point made by appellant that the waiver could only be in writing as provided by the terms of the policy, the case of *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246 . . . seems decisive. A large number of cases is therein cited and the conclusion is reached that 'An insurance company cannot so limit its capacity to contract by general stipulations against waiver of conditions or that its contracts or waivers must be in writing, that it cannot by its agents make an oral contract or a waiver not forbidden by the statute of frauds. Whether or not any particular agent has the general power of the company to make an oral contract or oral waiver of a condition notwithstanding the provision in the policy requiring a writing, is a question of fact.' "

In *Chase v. National Indemnity, supra*, 129 Cal. App. 2d 853, the agent's construction of the territorial limitation provisions of the policy was held binding upon the company.

(3) Where an insurance agent undertakes to advise the insured he has a duty to give the correct advice. And specifically, if the agent gives advice as to what

is necessary to constitute "occupancy," the company has been deemed either to have waived the occupancy provision or to be estopped to assert that the agent's advice was incorrect.

In *Glickman v. New York Life Ins. Co.*, 16 Cal. 2d 626, the insured informed the agent that he was disabled and could not pay his premiums and the agent informed him that the only thing he could do was to surrender the policy and get its cash value, whereas in fact by the terms of the policy he was entitled to certain disability benefits. The California Supreme Court stated at page 634:

"It therefore would be manifestly unjust, in this equitable action, to rule that the representations of the insurer's agent,—by which the insured was misinformed and misled with regard to his rights,—should operate to the prejudice of the insured and where, as here, a policyholder has approached his insurer with a request for advice concerning his rights under the policy,—if the agent of the insurer *undertakes to advise him*,—at least it should be the duty of such representative to make no false or misleading statement in that respect. Particularly should that be a requirement on the part of the insurer, or its agents, where, as in the present case, the information sought and given might have a direct and material bearing on the continuance of the life of the policy. In the instant case, the false and misleading statements of the insurer's representative as to the asserted rights of the insured under the policy not only operated to deprive the insured of one of the principal benefits accorded him by his contract, but they also resulted in a substantial gain to the insurer. In legal effect, such representations amounted to constructive fraud. (§1573, Civ. Code;

Hargrove v. Henderson, 108 Cal. App. 667, 673; 12 Cal. Jur., p. 710, and cases there cited.)

“Contract of insurance should be viewed in the light of their general objects and purposes, including the legitimate conditions prescribed by the insurer (*Raulet v. Northwestern etc. Ins. Co.*, 157 Cal. 213.)

. . . In general, the object and purpose of insurance is to indemnify the insured in case of loss, and ordinarily such indemnity should be effectuated rather than defeated. To that end the law makes every rational intendment in order to give full protection to the interests of the insured. (1 Couch Cyc. of Ins. Law, p. 402 *et seq.*)”

A case most appropriate to the facts here presented is *West Coast Lumber Co. v. State Inv. and Ins. Co.*, 98 Cal. 502. This was an action for fire loss on a three story frame store building located in San Diego. Plaintiff lumber company had a lien for lumber furnished on the building and had insured that interest. Prior to the loss defendants' agent was informed by the plaintiff that the leasehold interest had been surrendered by the tenant and was assured by the agent of defendant that no change in the policy of insurance was necessary by reasons thereof. The opinion states, beginning at page 508:

“The question involved under this head is not as to the binding effect of the clauses in the policy as to change of ownership or possession or as to the original right of defendants to insist upon their observance, and in default thereof to uphold a forfeiture of the policy. The proposition is rather that conceding all this, could and did the defendant waive their observance? Insurers may and often do by their acts and conduct place themselves in such a position that they cannot avail themselves of a

defense which they might otherwise interpose to an action upon their policies. When thus placed they are said to be estopped from availing themselves, or to have waived their right to avail themselves of such a defense.

“If, as was the case here, a building is insured against loss by fire under a policy containing a proviso that it shall be or become void in case the building is or shall become vacant or unoccupied, when, as was well known to the insurer at the date of the policy and subsequently, it was and remained unoccupied, the insurer will be presumed to have waived the clause as to occupancy. *May on Insurance* states it in this wise: ‘To deliver a policy with full knowledge of facts upon which its validity may be disputed, and then to insist upon these facts as ground for avoidance, is to attempt a fraud. This the courts will neither aid nor presume; and when the alternative is to find this or to find that, in accordance with honesty, there was an intent to waive the known ground of avoidance, they will choose the latter.’ (*May on Ins.*, Sec. 497; *Commercial Ins. Co. v. Ives*, 56 Ill. 402.)

“ . . .

“The agents of the defendant at San Diego having the authority to do so act must be presumed by their conduct and declarations exercised and made with full knowledge of all the facts, to have waived on behalf of defendant its right to have the policy terminated by the surrender of the leasehold interest of Newkirk to his lessor. To hold otherwise would be to uphold practices which would lull the insured into fancied security, to prevent their seeking other and further insurance, until when too late they find themselves doomed to loss by confiding in the decla-

rations and following the advice of those who are bound by every consideration of justice and honesty to speak the truth, or at least to stand mute.

“Defendant had a right to cancel his policy or to treat it as forfeited by reason of the change of title and possession; it failed to do so when it should, if at all, and cannot now be permitted to profit at the expense of plaintiff, who would be a sufferer by the delay.”

A case closely analogous factually to this matter is *Hotchkiss v. Phoenix Ins. Co. of Brooklyn*, 76 Wis. 269, 44 N. W. 1106.

Defendant company issued a fire policy in 1888 on a dwelling house occupied by a tenant of the insured. The tenant moved out of the house and it became unoccupied, except that the insured personal property remained therein and the plaintiff visited the house two or three times a week until the fire, less than a month later. The company refused to pay the loss claiming it was relieved from liability by a condition in the policy to the effect that if the premises should become vacant or unoccupied the policy should be of no force or effect during the time the premises should continue vacant or unoccupied. The court said at page 1107:

“The testimony tends to show that, immediately after the tenant vacated the insured house, the plaintiff went to see the agent of the defendant company at Omro, where the insured property was situated, informed him that the tenant had so removed, and asked him if her insurance was good, or, if it needed any change, what she should do, and that the agent replied that her insurance was good just as it was, and agreed to carry it in that way for thirty days.

Also, the question having been suggested to the agent whether the house would be considered occupied while the plaintiff's goods remained in it, he said it would, and there was no need of any vacancy permit to save the insurance while it was occupied in that way. This conversation occurred with the agent who issued the policy, and less than thirty days before the insured property was burned.

“ . . .

“There is no claim here that the agent waived any condition of the policy, but only that he construed certain words contained in it in a certain way. The term ‘vacant or unoccupied’ has no definite signification, applicable alike to all cases. If it had, the plaintiff would be bound by such signification. Under certain circumstances, premises may be vacant or unoccupied, when under other circumstances premises in like situation may not be so, within the meaning of that term in insurance policies. Thus, if one insures his dwelling-house, described in the policy as occupied by himself as his residence, and moves out of it, leaving no person in the occupation thereof, it thereby becomes vacant or unoccupied. But if he insure it as a tenement house, or as occupied by a tenant, it may fairly be presumed, nothing appearing to the contrary, that the parties to the contract of insurance contemplated that the tenant was liable to leave the premises, and that more or less time might elapse before the owner could procure another tenant to occupy them, and hence that the parties did not understand that the house should be considered vacant, and the policy forfeited or suspended, according to its terms, immediately upon the tenant's leaving it. This distinction is made in some of the cases,—in *Lockwood v. Assurance Co.*,

47 Conn. 553, 561; *Whitney v. Insurance Co.*, 9 Hun. 39; 1 Wood, Ins., §91, pp. 208-210, and cases cited.

“In this case the insured house was ‘to be occupied by the assured or tenant as a dwelling.’ It was in fact occupied by a tenant when the policy was issued, of which the company had notice. It being doubtful what the term ‘vacant or unoccupied’ means in such a case, and the policy in suit failing to define it, the plaintiff had the right to know whether the insurance company regarded her house as vacant or unoccupied immediately upon her tenant’s leaving it, to the end that, if the company did so regard it, she might taken the necessary steps to keep good the insurance. This being a foreign insurance company, and presumably having no general officer in this state, there was no one but the agent of the company at Omro to whom she could conveniently and directly apply for the desired information. She promptly applied to him, and he assured her, as the jury must have found, that, notwithstanding the removal of the tenant, her policy, just as it was, would remain valid for thirty days. That is to say, he assured her, in substance and legal effect, that the removal of the tenant did not render the premises ‘vacant or unoccupied,’ within the meaning of that term in the policy as understood by the company. We think she applied to the right person for the desired information, and that the company is bound by the construction which, in its behalf, the agent put upon the policy.

“The policy contained a stipulation that the agent of the company had no authority to change any of its conditions or restrictions by parol. But it is obvious that this stipulation is not involved in the

determination of this case, for the agent did not assume to change any such condition or restriction.”

This case thus declares that the construction of the word “occupied” placed on the policy by the agent is not a change in any of the conditions of the policy, but is the construction of an uncertain word.

However, in *North River Ins. Co. v. Rawls*, 214 S. W. 925, 185 Ky. 509 (1919), similar statements by the agent were held to effect a waiver of the occupancy provision of the policy, where the policy contained the usual provision that the policy was to be void if the building became vacant or unoccupied and so remained for ten days. The company relied on the provision, but plaintiff replied that the building had not become vacant or unoccupied; that he had a tenant on the property, all the time, except for a very brief period, and at that time he left in his residence furniture enough to furnish a room, and that before he left his house without a tenant for the short period mentioned he had applied to the agent for the insurance company for a vacancy permit, and that the agent for the company instructed him not to insist upon a vacancy rider, but to leave part of his furniture in the house, and if he would do so his house would not be vacant or unoccupied within the meaning of the clause of the contract above quoted; that in compliance with said instruction he did leave in said house certain furniture sufficient to furnish one room; that the said agent was the same who had solicited and procured his insurance, collected the premium, and delivered the policy to Reeder, and that by his said instruction he had for the insurance company waived the vacant or unoccupied clause of the policy, and said clause was not in force or effect at the time the fire occurred, but the policy was in full force and effect at said time.

This recurrent problem and an identical result in a case also similar to this matter is related in *Gordon v. St. Paul Fire & Marine Ins. Co.*, 197 Mich. 226, 163 N. W. 956 (1917). In that case at the time of the writing of the policy the plaintiff asked the agent whether she would get anything if anything happened while the house was vacant and was told by him that it would not be vacant within the policy if she had some furniture in it and visited it every 10 days or 2 weeks. From time to time thereafter the property was occupied by tenants, and the last tenant moved out some five or six months prior to the loss. The policy provided that the agreement would be void if the building became vacant or unoccupied and so remained for 10 days. The court held that it was permissible for a plaintiff to show that defendant's agent had knowledge when the policy was written that the premises were vacant, but that the conversation was inadmissible to show the agent's construction of the word "vacant" as used in the policy. The court said this was a matter of law and the agent's opinion could not bind the defendants or the courts, but held the company estopped from asserting a forfeiture for a condition of the premises existing at the time of the fire, which existed to the knowledge of the company at the making of the contract and which condition of the premises it was not agreed by the contract of insurance was to be changed. One case cited is *Cross v. National Fire Ins. Co.*, 132 N. Y. 133, 30 N. E. 390, where the court stated that plaintiff could recover despite the unoccupancy provision because "plaintiff's son was the general agent of the defendant, and personally examined the buildings before issuing the policy, and knew that they were vacant and unoccupied."

Thus in cases of closely parallel factual situations, the courts have held that the rights of an insured who in good faith makes known the facts to the agent and receives advice from him as to how the insurance is to be kept in effect, and who follows that advice, may not be forfeited by the insurer.

Conclusion.

We respectfully urge that the judgment be reversed on either of two alternative and distinct grounds: (1) that the insured property was in fact "occupied" at the time of the fire, or (2) that by reason of the conduct or knowledge of their agents, appellees are estopped to assert that the premises were unoccupied or have waived their rights to do so, and as a corollary to the latter proposition, constituting perhaps still a third ground, that appellees are bound by the construction placed upon the policy as approved by their agents.

Respectfully submitted,

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No. 15,230

IN THE

United States Court of Appeals

For the Ninth Circuit

MORGAN STIVERS,

Appellant,

VS.

NATIONAL AMERICAN INSURANCE COM-
PANY, a corporation, et al.,

Appellees.

BRIEF OF APPELLEES.

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FILED

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No. 15,230

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MORGAN STIVERS,

Appellant,

VS.

NATIONAL AMERICAN INSURANCE COM-
PANY, a corporation, et al.,

Appellees.

BRIEF OF APPELLEES.

I.

STATEMENT OF PLEADINGS.

The *complaint* sets forth eight alleged causes of action based on insurance contracts executed in the State of California by Appellees Girard Insurance Company, (hereinafter referred to as "Girard"); National American Insurance Company, (hereinafter referred to as "National"); Queen Insurance Company, (hereinafter referred to as "Queen"); and Insurance Company of the State of Pennsylvania, (hereinafter referred to as "State"), which are citizens of a state other than the State of California, to

Appellant Morgan Stivers, who is a citizen of the State of California.

In the *first, third, fifth and seventh alleged causes of action*, Appellant seeks to recover from Appellees various amounts of money, allegedly due Appellant under the terms of the respective written insurance contracts executed by each Appellee, whereby Appellant was insured against loss or damage by fire to a packing plant consisting of a packing house and platforms, equipment, field boxes and supplies and storage building, all situated at Side Station 3 miles north of Lindsay, Tulare County, State of California (4, 8, 13, 18).*

Appellant alleged that on October 13, 1954, such buildings and personal property were destroyed by fire; that Appellant's loss thereby was \$166,642.00 and that about December 21, 1954, Appellant delivered a Proof of Loss to each Appellee; that Appellant duly performed all of the conditions of said written insurance contracts on his part; and that the sum of \$40,000.00 is due, owing and unpaid from Appellees to Appellant on account of such loss (5-7).

In the *second, fourth, sixth and eighth* alleged causes of action, Appellant seeks to recover on the basis of a waiver of the occupancy conditions of said written insurance contracts by which the insurance was suspended if the packing house was permitted to remain unoccupied, but not vacant, in excess of 10 consecutive months. Appellant alleges that Appellees

*Arabic numerals herein refer to the page of the Transcript of Record.

orally agreed to and he hired and maintained a watchman on said premises at all times after the issuance of said insurance contracts and until said fire in lieu of occupancy (7, 12, 16, 21).

In its respective *answer*, each Appellee admitted the execution of its respective written insurance contract, the occurrence of this fire, the filing of the proof of loss, and that nothing has been paid on account of such loss. Each Appellee denied that Appellant had fulfilled the occupancy conditions of its written insurance contract on his part to be performed or that Appellee waived such occupancy conditions or consented to a watchman in lieu of the occupancy provisions of its contract (55, 57, 61, 66, 72).

II.

STATEMENT OF THE CASE.

Effective the 1st day of December, 1952, for a premium based upon rates fixed by the Pacific Fire Rating Bureau with the subject of the insurance occupied (192, 208-209), each Appellee executed to Appellant a standard written form of California fire insurance policy, as set forth in Ins. C. Section 2071, and attached thereto a written standard form of building, equipment and stock endorsement Form 78 (Ex. 1, 2, 3 and 4, T. 111), whereby each Appellee insured an orange packing plant, consisting of the following buildings and personal property in the following amounts:

	Item 1 Parking House and Loading Platform	Item 2 Equipment	Item 3 Stock	Item 5 Storage Building
(1) Girard	\$5,000	\$5,000	nil	nil
(2) National	5,000	nil	\$1,500	\$1,500
(3) Queen	5,000	2,500	2,000	500
(4) State	3,000	5,000	1,500	500
Total	\$18,000	\$12,500	\$5,000	\$2,500

By express provision of Building, Equipment and Stock Endorsement Form 78, said Item 1 (Packing House and Loading Platform) was insured "while occupied as Packing House and Loading Platform"; Item 2 (Equipment) pertaining to insured's occupancy "only while contained in, on or attached to the above described building"; Item 3 (Stock) consisting principally of field supplies and boxes all, only, while contained in, on or attached to the above described building"; and Item 5 (Storage) "On storage building situate: on above described premises".

Such California standard fire insurance contracts provided, in part, as follows:

(1) Lines 149-152:

"Suit: No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all of the requirements of this policy shall have been complied with."

(2) Lines 28-34:

"Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto

this Company shall not be liable for loss occurring . . . (b) *while a described building*, whether intended for occupancy by the owner or tenant is vacant or unoccupied beyond a period of 60 consecutive days; . . .” (Emphasis supplied.)

(3) Lines 46-51:

“Waiver Provisions. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provisions, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this company relating to appraisal or to any examination provided for herein.”

Paragraph 21 of said Building, Equipment and Stock Form 78 provided, in part, as follows:

“Vacancy—Unoccupied Clause: Permission is granted to remain vacant or unoccupied without limit of time, Except as Follows: . . .; (2) If the *subject of insurance (whether building or contents or both)* is a cannery, fruit, nut or vegetable packing or processing plant . . . permission is granted (a) to remain vacant not to exceed sixty (60) consecutive days, and (b) to remain unoccupied but not Vacant for not to exceed ten (10) consecutive months. Nothing herein contained shall be construed to abrogate or modify *any provision* or warranty of this policy *requiring* (1) the maintenance of *watchman* service.” (Emphasis supplied.)

Prior to the execution of such written insurance contracts, Appellant through his nephew (121), Truman B. Stivers (hereinafter referred to as

“Nephew”) represented to Appellees that the Packing House and Loading Platform was occupied, as follows:

(a) On October 29, 1952, at the request of Appellant, Clara Heysler (authorized employee of Appellant's Nephew) (153, 154) executed and delivered a written application to Appellees National and Girard, wherein the described occupancy was expressly stated for a “Packing House and Loading Platform” (208-209, Ex. H and C, 166-167), and did not state the packing plant would not be operated.

Upon receipt of such application, Appellee National applied in writing to the Pacific Fire Rating Bureau for a rate based on occupancy as a citrus packing shed and loading platform (Ex. J, 231-236).

(b) Likewise, at the request of Appellant, Nephew's office telephoned Roy A. McMillan to renew the expiring policies in State and Queen (242). According to McMillan's knowledge the Packing House and Loading Platform was occupied, and he was not informed that the packing plant was not to be operated. McMillan, in turn, notified Appellees State and Queen of the occupancy and requested each of them to renew its policy (244-245). McMillan did not receive any information from Appellant that there was any unoccupancy or that there would be no operation as a packing plant (243).

The insured property was classified as Class “D,” which is the classification for property in an unprotected fire area (231), and the rate published by the

Pacific Fire Rating Bureau for an occupied premises was applied (Ex. J, 209, 236, 256, Ex. 1, 2, 3 and 4).

At the time it executed its said written insurance contract, each Appellee believed the Packing House was occupied and operated as a citrus fruit packing house, and it had not been told by Appellant of any unoccupancy or that there would be no operation as a packing plant (209, 215, 252, 254).

Since 1949, Nephew has been Appellant's agent taking care of all of Appellant's insurance (117, 122, 125).

Nephew was not an agent for Appellee Queen or State (135, 189).

After the policies were executed and delivered to Nephew and Appellant, neither Appellant nor Nephew made any objection to such written insurance contracts (247, 136, 138).

III.

SUMMARY OF ARGUMENT.

A reading of Appellant's "specification of errors" shows that this appeal is based upon the ground that the evidence was insufficient to support the findings of the trial Court that the insurance contracts were suspended by reason of the unoccupancy of the packing house, or that Nephew was an agent of Appellant. Therefore, the only issue before this Court is a question of fact as to the sufficiency of the evidence to support such findings.

It is settled law that even though there is a conflict in the evidence, this Court will assume as true the view of the evidence most favorable to Appellee; and the findings of fact of the trial Court are presumptively correct and its findings should not be disturbed unless clearly erroneous, and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses.

To support the Court's findings that the insurance contracts were suspended at the time of the fire, the evidence shows that the insured property was an orange packing plant which was unoccupied for more than 10 consecutive months prior to the fire. The evidence was insufficient to show that Appellant complied with the occupancy provisions of the insurance or to establish a waiver of such occupancy provisions.

It is the position of Appellees that the evidence is sufficient to support the Court's findings of such unoccupancy, and that the Nephew was an agent for Appellant, and such findings are not clearly erroneous.

IV.

ARGUMENT.

A. CALIFORNIA LAW APPLICABLE.

Since the subject contracts were made in the State of California, the law of the State of California is applicable,

Exchange Lemon Products Co. v. Home Ins. Co. (1956 9th Cir.) 558, 561;

Van Meter v. Franklin Fire Ins. Co. (1947 9th Cir.) 164 F. 2d 325.

B. BURDEN OF PROOF UPON APPELLANT.

1. To establish findings clearly erroneous.

This Court has repeatedly stated the rule is well settled that an Appellate Court cannot disturb findings of the trial Court based on conflicting evidence taken in open Court except for clear error.

Where there is a conflict in the evidence the findings of the trial Court are presumptively correct and should not be disturbed unless clearly erroneous. Findings of fact are to be accepted as true, even where the Appellate Court is convinced it would have found otherwise upon the evidence. Unless there is clear error in a finding, the finding of a trial Court is conclusive.

Hartford Accident & Indemnity Co. v. Jaspers
(1944 9th Cir.) 144 Fed. 2d 266, 267;

Rule 52a of the Federal Rules of Civil Procedure;

Wingate v. Bercut (1944 9th Cir.) 146 F. 2d 725.

On an appeal, even though there is a conflict in the evidence, this Court will assume it true in view of the evidence most favorable to Appellee.

Wilmington Transportation Co. v. Std. Oil Co.
(1931 9th Cir.) 53 F. 2d 787.

2. To prove occupancy.

When the subject of an insurance contract is a fruit packing plant "while occupied" and provides that the insurer shall not be liable for a loss occurring while a building is unoccupied beyond a period of 10 consecutive months, the burden of proof is upon the in-

sured to allege and prove that the building was occupied; otherwise, the insured cannot recover as such occupancy is an essential element of his insurance contract,

Nat'l. Reserve & Ins. Co. v. Ord (1941 9th Cir.)
123 Fed. 2d 73—packing house, *wherein* the
Court stated:

“Unless the provision that the insurance covered the building while occupied only for packing plant purposes is negated by a rider on the policy . . . insured under the controlling California law, was not entitled to recover.”

Northwestern Nat'l. Ins. Co. v. McFarlane
(1931 9th Cir.) 50 Fed. 2d 539;
Allen v. Home Ins. Co. (1901) 133 Cal. 29, 32;
65 P. 138—wherein the Court stated:

“It was essential for plaintiff to prove that the fire occurred while the premises were occupied as such dwelling house . . . The allegation was not merely a condition precedent, as referred to in Section 457 of the Code of Civil Procedure. It went to the very essence of plaintiffs' right to recover.”

Arnold v. American Ins. Co. (1906) 148 Cal.
660; 84 P. 182;
Walker v. Mechanics Ins. Co. (1931) 119 C.A.
243, 245; 6 P. 2d 355.

3. To establish waiver.

Gawecki v. Gen. Ins. Co. of Am. (1948 9th Cir.)
167 Fed. 2d 894, affirming 72 F. Supp. 430;
*Aronson v. Frankfurt Accident & Plate Glass
Ins. Co.* (1908) 9 C.A. 473, 480; 99 P. 537—
wherein the Court stated:

“A waiver in law is the intentional relinquish-
ment of a known right; and the burden is upon
the party claiming such waiver to prove it by
such evidence as does not leave the matter doubt-
ful or uncertain.”

(a) Insurer authorized to limit authority of an agent.

Belden v. Union Central Life Ins. Co. (1914)
167 Cal. 740, 743; 121 P. 370.

(b) No agent has authority to waive any provision of the policies except by writing endorsed thereon or attached thereto.

Such limitation of authority is mandatory under
the laws of the State of California,

Insurance Code 2071;

Wilson v. Maryland Casualty Co. (1937), 19
Cal. App. 2d 463, 465; 65 P. 2d 903.

(i) Restriction of authority to waive is valid.

In *Gawecki v. Dubuque Fire and Marine Insurance
Co.* (1947, Cal. S.D.) 72 F. Supp. 430, 431, it was
stated:

“Hargett v. Gulf Insurance Company, 1936, 12
Cal. App. 2d 449, 55 P. 2d 1258 and cases therein
cited, dating back to *Steil v. Sun Insurance Com-
pany*, 171 Cal. 795, 155 P. 72, decided in 1916,
and which has been followed ever since. See also,
Cinema Schools v. Westchester Fire Insurance

Co., D. C. Cal., 1932, 1 F. Supp. 37, and *Cinema Schools v. Federal Union Insurance Co.*, D. C. Cal., 1932, 1 F. Supp. 42, both decided by Judge John Knox of the Southern District of New York, while sitting in this district. See also, *Sun Insurance Office v. Scott*, 1931, 284 U. S. 77, 52 S. Ct. 72, 76 L. Ed. 229. There has been no waiver of this condition by any agent of either company authorized to make such waiver. See the above cases and the opinion of our late colleague Ralph E. Jenney, in *Alexander v. General Insurance Co. of America*, D. C. Cal., 1938, 22 F. Supp. 157."

"What is more, such mere knowledge without more was not effective as a waiver of the condition. For the policies distinctly provided for the only manner of waiving conditions in them."

Wilson v. Maryland Casualty Co. (1937) 19 C.A. 2d 463, 465; 65 P. 2d 903;

Northwestern Nat'l. Ins. Co. v. McFarlane (1931 9th Cir.) 50 F. 2d 539;

Eddy v. National Union Indemnity Co. (1935 9th Cir.) 78 F. 2d 545, 547—rehearing 80 F. 2d 284.

- (c) Upon receipt and acceptance of insurance policies, appellant charged with knowledge of its terms, including the limitation of the power to waive.

Belden v. Union Central Life Insurance Co. (1914) 167 Cal. 740, 743; 121 P. 370.

- (d) Knowledge of conditions suspending insurance does not constitute waivers.

Conditions which render a policy void ab initio must be distinguished from conditions which only

suspend insurance during the period of violation. Where the insurance is suspended, the knowledge of an agent does not constitute a waiver,

Steil v. Sun Ins. Co. (1916) 171 Cal. 795, 802; 155 P. 72;

Rizzutto v. National Reserve Ins. Co. (1949) 92 C.A. 2d 143, 147; 206 P. 431, wherein the Court stated:

“It is settled by the case of *Steil v. Sun Ins. Co.* 171 Cal. 795 (155 P. 72) that a violation such as that in this case does not render the policy void ab initio. The insurance is simply suspended for the duration of such departure or violation. The *Steil* case holds that the insurance clause completely protects the insurer but does so without going to the extent of voiding the policy.”

In *Keys v. Northwestern Nat. Ins. Co.* (1924 Cal. S.D.) 16 F. 2d 798, at 799:

“The insurer was not bound to cancel the policies upon notice of change of use, but had the right to assume that the insured, mindful of the suspension clause of the contract, might return the building to its use as a dwelling house, and so restore the binding effect of the policy at any time.”

C. INSURANCE AGENT MAY BE AGENT OF INSURED AS WELL AS INSURER, THEN HIS KNOWLEDGE IS KNOWLEDGE OF THE INSURED.

An insurance agent may be an agent of the insured as well as the insurer, and in that event the agent's knowledge is the knowledge of the insured.

In *Holbrook v. Baloise Fire Ins. Co.*, 117 Cal. 561, 567; 49 P. 555, which was an action on a fire insurance policy, Henderson as a broker for plaintiff and McMahan negotiated a loan from plaintiff to McMahan which was secured by a mortgage from McMahan to plaintiff. As an insurance agent for defendant, Henderson applied for the insurance from defendant to McMahan and plaintiff (Mortgagor—Mortgagee), which defendant issued, containing a provision making the policy void if the insured procured other insurance on the same policy. Then, Henderson obtained a policy from the Insurance Company of North America. Held: Reversed judgment for plaintiff, and directed trial Court to enter judgment for defendant on findings, stating:

“It is true the court found that McMahan ‘had no actual personal knowledge’ of its issuance; but considering the other facts found this must be held to mean no more than what it literally imports—that he had no knowledge thereof derived from the immediate exercise of his own sense; . . . If these facts do not show that McMahan had actual notice of the Baloise policy, they at least show that Henderson was the agent of McMahan to whom the latter committed the matter of obtaining the same, and that Henderson’s knowledge of the issue thereof must be imputed to McMahan.”

D. INSURANCE AGENT REQUESTING INSURANCE FROM AN INSURER HE DOES NOT REPRESENT IS AGENT OF THE INSURED.

Detroit Trust Co. v. Transcontinental Ins. Co.
(1930) 105 C. A. 395, 400; 287 P. 535, which followed

Solomon v. Federal Ins. Co. (1917) 176 Cal. 133, 138; 167 P. 859, where the Court stated:
“It is well settled that . . . where . . . an insurance agent requests insurance from a company which he does not represent he is acting for the insured . . .”

E. INSURED'S AGENT'S KNOWLEDGE OF INSURANCE AND TERMS OF POLICY IS KNOWLEDGE OF THE INSURED.

Eagle Star & Brit. Dominion v. Paddock (1938, D. C. C.) 22 F. Supp. 545, 548;
Strangio v. Consolidated Ins. Co. (1933 9th Cir.) 66 Fed. 2d 330.

F. WITNESS WILFULLY FALSE SHOULD BE REJECTED.

A witness false in one part of his testimony is to be distrusted in others. The whole testimony of a witness who has wilfully testified falsely as to a material point may be rejected,

Code of Civil Procedure, State of California,
Section 2061.

Such well recognized rule was undoubtedly applied by the trial Court.

G. EVIDENCE LEGALLY SUFFICIENT TO SUSTAIN FINDINGS (PARS. X (90), XIV, XV (92), XVIII (93)) INSURANCE SUSPENDED AT TIME OF FIRE BECAUSE THE PACKING PLANT WAS NOT OCCUPIED AS CONTEMPLATED BY THE TERMS OF THE INSURANCE.

1. The subject of the insurance was an orange packing plant.

It is uncontradicted that the subject of the insurance was an orange packing plant consisting of said orange packing house and loading platform, storage building, cull bin and all the equipment necessary to operate a packing house (102, 109, 178). When Nephew's employee Mrs. Clara M. Heysler telephoned Appellee she described the property as a packing plant (154-155). Throughout the trial of this action, Counsel for Appellant referred to the subject of insurance as "packing plant property" (203, 197, 193-194, 178, 155, 145, 130, 116, 113).

2. Unoccupancy suspends the insurance.

By the express provisions of the Standard California fire insurance policy, Ins. C. 2071 (Ex. 1-4, inclusive), at lines 28-34 the insurance is suspended:

"Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this company shall not be liable for loss occurring . . .; or (b) *While a described building*, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of 60 days; . . ." (Emphasis supplied).

Paragraph 21 of said Building, Equipment and Stock Endorsement No. 78 extends the period of unoccupancy for a fruit packing plant "not to exceed 10 consecutive months."

“VACANCY—UNOCCUPIED CLAUSE: Permission is granted to remain vacant or unoccupied without limit of time, EXCEPT AS FOLLOWS: . . . (2) If the subject of insurance (*whether building or contents or both*) is a cannery, fruit, nut or vegetable packing or processing plant, . . . permission is granted (a) to remain vacant for not to exceed sixty (60) consecutive days, and (b) to remain unoccupied BUT NOT VACANT for not to exceed ten (10) consecutive months. Nothing herein contained shall be construed to abrogate or modify any provision or warranty of this policy requiring (1) the maintenance of *watchman* service; . . .” (Emphasis supplied.)

- (a) Occupancy provision is to prevent consequent increase in risk from unoccupancy.

“It is apparent the insurers intended to guard against the increased risk which inevitably affects buildings where no one is living or carrying on any business. An unoccupied building invites shelter to wanderers and evil-disposed persons. No one interested is present to watch or care for the property, or seasonably to extinguish the flames in case of fire; and, for various reasons that might be enumerated, an unoccupied building is more exposed to destruction, to say nothing of the inducement a dishonest owner would have to turn it, if unprofitable, into money, when insured, by becoming a party to its destruction by fire . . .”

Moore v. Phoenix Ins. Co. (1886) 64 N. H. 140,
6 Atl. 27, 32.

This plant was in an unprotected fire area (231), along a railroad right of way, where strangers sought entrance into the packing house (222).

(b) Unoccupancy provisions are clear, consistent and unambiguous.

These provisions are mandatory under the law of the State of California, Ins. Code 2071. No California or Ninth Circuit decision has ever stated the Unoccupied Provisions were ambiguous. As pointed out in *Nat'l. Reserve Ins. Co. v. Ord* (1941, 9th Cir.) 123 F. 2d 73, 75, because such provisions are clear:

“Our construction of the policy is confined to its terms.”

In considering the phrases “while occupied as” and “only while occupied as”, *Connecticut Fire Ins. Co. v. Buchanan* (1905, 8th Cir.) expressly stated:

“One of the policies insured the building as a ‘normal school and dwelling’, and the other insured it ‘occupied and only while occupied as a normal school and dwelling.’ . . .”

“These provisions are consistent, certain and unambiguous, and counsel for the insured do not even suggest that they are otherwise. The difference in the two policies is one of words only, not of meaning or legal effect. Both plainly contemplate use and occupancy of the building as a normal school and dwelling, and make the same a condition to the acceptance and continuance of the risk. Words could hardly have been chosen to better or more certainly express the purpose of the parties to exclude liability on the part of the insurers for any loss occurring when the building was without the care, supervision, and protection involved in such use and occupancy.”

Likewise, the express provisions of the insurance policies in this action relating to unoccupancy are clear, consistent, and certain provisions.

In the words of the trial Court, the Honorable Ben Harrison:

“One of the contentions made by the plaintiff is that liability was not suspended because the premises were not insured as a fruit packing plant. Plaintiff refers to the fact that in none of the policies of insurance is there a complete description of the packing plant; it is not described with specificity as a fruit packing plant. Both the insurer and the insured knew that it was not operating thus making the occupancy clause inoperative.”

“There is no dispute that the property including machinery and equipment was geared for operation as a citrus fruit packing plant. It had in fact in the past been used as such. The contention made by the plaintiff that the description of the premises on the individual insurance policies is controlling is without merit in that the subject of insurance was as a matter of fact a fruit packing plant and under such circumstances it is proper to look at the subject of insurance rather than the title on the respective insurance policies. The status of the insurance is not changed by a description on the policy.

“A contract should be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of contracting (Cal. Civ. Code Sec. 1636) and a fire insurance policy should be construed in like manner to cover the subject matter intended. Appleman, Insurance Law & Practice, Vol. 4, p. 174. A ‘packing house’ is used

to pack 'something', in this case citrus fruit and a common-sense interpretation of the contract results in it being a policy to insure a fruit packing plant. (See Cal. Civ. Code Sec. 1644)."

3. Occupancy means operating as a fruit packing plant.

As expressed in *Sternberg v. Merchants Fire Assur. Corp.* (1934) 6 F. Supp. 541—Hotel,

"If a mercantile establishment, a mercantile business must be carried on therein; if a factory, it must be operated as a factory; if a barn it must be used as barns are ordinarily and customarily used; if a hotel, it must be used and operated as a hotel."

Likewise, if a packing plant, it must be used and operated as a packing house,

National Reserve Ins. Co. v. Ord (1941 9th Cir.) 123 Fed. 2d 73—packing house;

Northwestern Nat'l. Ins. Co. v. McFarlane (1931 9th Cir.) 50 Fed. 2d 539—dwelling.

(a) Appellant had full knowledge (actual and imputed) of occupancy requirements.

As early as 1949 or 1950, Appellant knew that if the packing plant was not operated, there would be no insurance protection under the written insurance contracts (142-143).

Appellant received and accepted the subject insurance contracts and is chargeable with knowledge of said occupancy provisions,

Belden v. Union Central Life Ins. Co. (1914) 167 Cal. 740, 743; 141 P. 370.

Likewise, Nephew is chargeable with full knowledge of the occupancy provisions in the subject insurance contracts (183). Further, as to Appellees Queen and State, Nephew was the agent of Appellant as a matter of law,

Detroit Trust Co. v. Transcontinental Ins. Co.
(1930) 105 C.A. 395, 400; 297 P. 535;

Solomon v. Federal Ins. Co. (1917) 176 Cal.
133, 138; 167 P. 589.

4. **Admitted no operation for more than 10 consecutive months prior to fire.**

The packing plant was not operated during the term of the insurance contracts (110).

5. **Occupancy of the packing house determines the occupancy of the storage building.**

The insurance contracts referred to the subject of the insurance being unoccupied, such as the packing house; and the occupancy of the packing house determines the character of the storage house and other buildings used in connection with it.

See: *Farmers Fire Ins. Co. v. Farris*, 1955, 224 Ark. 736; 276 S.W. 2d 44—where the Court stated:

“The status of the barn as regards vacancy or unoccupancy cannot be used to affect such status of the house. In other words, ‘the tail cannot wag the dog.’ In Appleman on ‘Insurance Law & Practice’, Vol. 4, p. 788, the rule as respects a house and barn being insured in the same policy, is stated as follows:

‘. . . if the insurance is upon a farm dwelling and subordinate buildings, the occupancy of the dwelling determines the character of the occupancy of a barn and other outbuildings used in connection with it. The buildings could not, therefore, be considered unoccupied if the insured resides in the dwelling, it not being necessary that each of such outbuildings be used constantly; but if the dwelling has definitely been vacated, recovery may not be had for destruction of the other buildings.’ ”

(a) Occupancy of trailer house does not constitute occupancy of packing house.

The insurance contracts did not insure the premises but did insure the packing house, other buildings, stock and equipment. The insurance contracts do not refer to the premises being occupied. It is the status of the building and not the premises, that affects the occupancy provision.

See: *Rossini v. St. Paul Fire & Marine Ins. Co.* (1920) 182 Cal. 415; 188 P. 564.

Therefore, living in an unattached, uninsured trailer cannot be occupancy of the packing house.

See: *Farmers Fire Ins. Co. v. Farris*, 224 Ark. 736; 276 S.W. 2d 44—where the Court stated:

“The rule stated by Appleman is correct. Here the insurance is on a farm dwelling and a barn, and the status of the barn as regards vacancy or unoccupancy cannot affect the status of the dwelling. Such is the vice in Appellee’s Instruction No. 4.

. . . in the case at bar, the policy does not refer to the premises being vacant, but refers to a building

being vacant. Under the rule stated in Appleman, as aforesaid, the status of the barn as regards vacancy or unoccupancy cannot be carried over and imputed to the dwelling; and yet Instruction No. 4 so told the Jury."

6. A closed up building equipped to operate does not constitute occupancy.

The terms "vacant" and "unoccupied" as used in the Standard California fire insurance policy are not synonymous but are alternative terms. A building is vacant unless it contains the personal property (e.g., equipment, machinery, tools) ordinarily contained therein to enable the use of said building for the purpose for which it is adapted (citrus packing house). A building is unoccupied (but not vacant) if it contains such personal property but no packing operation is conducted therein. Such distinction was expressly recognized and approved in *Foley v. Sonoma County Farmer's Mutual Fire Ins. Co.* (1941) 18 C. 2d 232; 115 P. 2d 1:

"A dwelling may be unoccupied even though it is not vacant; the terms are neither synonymous nor complementary. They are used in the present clause as alternatives and not in conjunction. The term 'vacant' is associated with removal of inanimate objects from a dwelling; the term 'unoccupied' is associated with the abandonment of that dwelling as a customary abode by its former occupants."

See:

Connecticut v. Buchanan (1905, 8th Cir.) 141 Fed. 877—where a normal school and dwelling shut down, leaving as storage a library

and household effects; a new lease had been executed but the tenant had not taken possession, but a former teacher visited the building twice a day.

Sternberg v. Merchants' Fire Assur. Corp. (1934 D. C. Wis.) 6 F. Supp. 541, 543—where a hotel shut down, leaving the furniture and equipment left in it, and the insured's son occupied one room while it was shut down, the Court stated:

“It cannot be that a complete suspension of use and occupancy of a residence, or a business, or a factory, can be adjudged to be contemplated beyond the policy limitation because of the hope or the expectation that, at some time there may or might be a renewal of the real and the declared occupancy. It cannot be sensibly held in a case like this that the parties contemplated in a dual sort of way (1) real occupancy and operation by a hotel business and (2) storage occupancy by the furniture and equipment between tenancies, regardless of the policy limitation.”

7. Making repairs to a building does not constitute occupancy.

“When no one actually resides in a house, altering, repairing or the process of moving the building does not constitute occupancy.”

Mauck v. Northwestern Nat'l. Ins. Co. (1929)
102 C.A. 510, 515; 283 P. 338.

While subdivision (c) of Paragraph 23 provides for repairs and alterations, as follows:

“(c) For the building(s) to be in course of construction, alteration or repair, all without limit

of time but without extending the term of this policy, and to building additions thereto, and this policy, under its respective item(s), shall cover on or in such additions in contact with such building(s)'';

it does not provide that repairs constitute occupancy.

California has recognized that unoccupancy and the making of repairs constitute separate perils to a building. Formerly, Ins. Code 2071 provided for each of them as follows:

“Unless otherwise provided by agreement endorsed hereon or added hereto this company shall not be liable for loss or damage occurring . . .

(c) While mechanics or artisans are employed in building or altering or repairing the described premises for more than 15 days at any one time; . . . or (f) while a building; herein described whether intended for human occupation by owner or tenant is vacant or unoccupied beyond the period of ten (10) consecutive days; . . .”

Paragraph 21 of Building Endorsement was drafted to extend the period of unoccupancy. Paragraph 23 (c) thereof was drafted to permit repairs, regardless of occupancy, and there is no provision in the policy that making repairs will cure unoccupancy. To the contrary, *Mauck v. Northwestern Nat'l. Ins. Co.*, supra, points out that in the absence of occupancy of the building, repairs or alterations will not cure unoccupancy.

Therefore, Appellant did not sustain his burden of proof requiring him to comply with the occupancy provisions of the written contracts of insurance.

**H. EVIDENCE LEGALLY SUFFICIENT TO SUSTAIN
FINDING (PAR. XVI (92)) NO WAIVER.**

1. Nephew Truman B. Stivers not agent of Queen or State.

Admittedly, said Nephew was not an agent of Appellees Queen or State (189), and he did not talk to either Queen or State (188), and neither Queen nor State authorized him to act for it (189).

2. Neither Queen nor State knew there was unoccupancy or no operation.

Roy A. McMillan, agent for Queen and State was not told by Appellant, Nephew or Nephew's employee Clara M. Heysler that there would be no operation during the policy period (143, 243-244).

Agent Roy A. McMillan informed Queen and State in writing that the packing house was occupied (244-246), and the underwriters at Queen, R. F. Owen and State, David A. Hull, did not know there was unoccupancy or that the plant was or would not be operated (252-255).

3. Neither Girard nor National knew there was unoccupancy or no operation.

Nephew's employee Heysler did not tell Girard (160-161) or National (166-167) that the packing plant would not be operated. She told Girard:

“it was the same packing plant they carried the insurance on and we were simply renewing it under the same conditions as far as I knew” (160);

and National that the occupancy was a packing plant (167).

Russell J. Baker of Girard (209) and George Donald of National (230-235) testified Nephew's office did not disclose any unoccupancy or that there would not be any operation.

4. Concern for rates may have caused Appellant and Nephew to conceal the fact the plant was not operated.

According to Berenice Zimmerman (Appellant's Office Manager), Nephew's employee Mrs. Florence Woods Dines informed her that "because the plant was non-operating, that the rates on the insurance would be higher" (147); and Mrs. Zimmerman so informed Appellant. Nephew's employee Mrs. Heysler's first telephone call to Appellee National was only on the subject of rates (154-155). When Nephew instructed Mrs. Heysler and Mrs. Woods concerning placing this insurance, Nephew was considering the rate to be charged (176-177).

5. Appellant's knowledge or notice prevents waiver or estoppel.

It is settled law that knowledge or notice (actual or imputed) on the part of Appellant of the occupancy or waiver provisions of the insurance will bar Appellant's claim that he was misled.

See: *Terminix Co. v. Contractors' State License Board* (1948) 84 C.A. 2d 167; 190 P. 2d 24;
W. J. Latchford Co. v. So. Calif. Gas Co.
 (1932) 125 C.A. 112, 114; 13 P. 2d 871;
Gridley v. Tilson (1927) 202 Cal. 748, 751; 262 P. 322.

(a) Appellant had knowledge (actual and imputed) of occupancy requirement and waiver provision of policy.

Appellant seeks to recover on policies, effective December 1, 1952, which were not only issued and delivered to him prior to December 1, 1952, but were renewal policies with the same occupancy and waiver provisions contained in the first policies Appellees Girard, Queen and State issued and delivered to Appellant, effective December 1, 1949. No objection was made to the original or renewal policies by Appellant.

Taff v. Atlas Assur. Co. (1943) 58 C.A. 2d 696, 703; 137 P. 2d 483.

In the absence of operating the packing plant, Appellant knew there would not be any insurance (142-143) or that the insurance would be in "jeopardy" (191). Appellant's office manager Berenice Zimmerman informed him that a watchman would have to be maintained at all times (149-150). Hence, Appellant has not been misled in any way by any Appellee.

(b) No evidence Appellant saw or knew of Nephew's letter of appointment (Ex. 5) from Appellee National or his agency contract (Ex. 6) with Appellee Girard.

There is no evidence in this record that Appellant knew of or ever saw such letter of appointment or agency. Obviously, he did not rely upon and was not misled by either document.

Files v. Derdenian (1919) 44 C.A. 256, 258; 186 P. 184.

The only written instrument Appellant saw was the insurance contracts which expressly limited his Nephew's authority to a written waiver either

“granted” in the policy itself or “expressed in writing added” thereto. And Appellant had actual and imputed knowledge of such limitation.

I. EVIDENCE LEGALLY SUFFICIENT TO SUSTAIN FINDING (PAR. XVII (93)) NO WATCHMAN MAINTAINED AT ALL TIMES.

Assuming arguendo that which Appellees specifically deny that Appellant was authorized to use a watchman in lieu of occupancy provisions, or that Appellees waived such occupancy requirements, then Appellant did not perform the conditions on his part to be performed.

1. Watchman was to be maintained at all times.

Appellant's office manager for the past 10 years (152), Berenice Zimmerman admitted that Nephew's employee Mrs. Florence Woods Dines informed her prior to the effective date of the insurance contracts, that if the packing house was not operated, then there would have to be a watchman on the property at all times (149-150).^{*} Said Zimmerman informed Appellant that he would have to have a watchman on the premises at all times; thereafter she informed Mrs. Dines that Appellant would do whatever was required to comply with the terms of the insurance contract (149-151). Mrs. Dines testified that Mrs. Zimmerman said:

^{*}Obviously such requirement was for the protection of and applicable to all the buildings and personal property, including the storage building.

“that they would have someone occupying the property at all times” (134).

2. No watchman maintained at all times.

Ruby Morris admitted that at the time of the fire and for several hours prior thereto, there was no watchman at the premises (224-226).

In fact, the Morris family did not have any access into the packing house (223). The Morris family consisted of Ruby Morris, her husband and a 16 year old son (222, 225). They had a house trailer situated about 50 feet from the packing house (222) and the Morrises paid their own lights (224). Edward L. Myers a neighbor of the Morrises stated that during the month and a half that the Morrises lived in this trailer, they worked away from the premises picking olives at Porterville (202, 203, 226), and they left between 6 and 7 A.M. each morning and would return between 3 and 5 P.M. (202, 203). On the morning of the fire Ruby Morris and her husband left the trailer to go to work to pick olives about 5 A.M. and returned about 4:30 to 5:00 in the afternoon (225, 202). Their 16 year old son was away picking olives the day of the fire (226) and he was not at the premises at the time of the fire (204).

In the absence of a continuous watch, the insurance is suspended during the watchman's absence.

See: *McKenzie v. Scottish Union & Nat'l. Ins. Co.* (1896) 112 Cal. 548; 44 P. 922—approved and followed in *Delta Lumber and Box Co. v. Lobugh* (1946) 64 F. Supp. 51, 52;

Shamrock Towing Co. v. American Ins. Co.
(1925 2d Cir.) 9 Fed. 2d 57;

Home Insurance Co. v. Ciconett (1950 6th Cir.)
179 Fed. 2d 892;

Continental Ins. Co. v. Patton-Tully Transportation Co. (1954 5th Cir.) 212 F. 2d 543.

**J. EVIDENCE LEGALLY SUFFICIENT TO SUSTAIN FINDINGS
(PARS. II (d), IV, V, VI AND VII (86-88)) NEPHEW WAS
AGENT OF APPELLANT.**

Since 1948, Nephew had been licensed to transact insurance in the State of California as an insurance agent (172). Thereafter, at all times Nephew had been Appellant's agent (125, 117), and had taken care of all of Appellant's insurance as Appellant's agent (122), placing over four million dollars of insurance for Appellant (176).

Further, Nephew was not an agent for either Appellee State or Queen (135, 189) and where an insurance agent requests insurance from a company he does not represent, he is the agent of the insured as a matter of law.

Detroit Trust Co. v. Transcontinental Ins. Co.
(1930) 105 C.A. 395, 400; 287 P. 535, which followed

Solomon v. Federal Ins. Co. (1917) 176 Cal.
133, 138; 167 P. 859, where the Court stated:

"It is well settled that . . . where . . . an insurance agent requests insurance from a company which he does not represent he is acting for the insured . . ."

1. Insured's agent's knowledge of insurance and terms of policy is knowledge of the insured.

Eagle Star & Brit. Dominion v. Paddock (1938, D. C. C.) 22 F. Supp. 545, 548;

Strangio v. Consolidated Ins. Co. (1939, 9th Cir.) 66 F. 2d 330.

K. TRIAL COURT WAS ENTITLED TO REJECT TESTIMONY OF APPELLANT—NEPHEW—HEYSLER RE: WAIVER AND COMPLIANCE.

1. Appellant.

As a party plaintiff, Appellant has an important interest in the result of this case,

Konig v. Lyon (1919) 49 C. A. 113, 116, 192 P. 875.

Appellant was contradicted by his office manager Berenice Zimmerman (149-151) and by his examination under oath on December 29, 1954 (142-3, 125) that a watchman was to be maintained at all times (125, 142-3).

2. Nephew.

Apart from being an immediate relative of Appellant, Nephew owed a duty to Appellant to properly handle his insurance; and, if he was negligent in the case at bar, Nephew could be personally liable to Appellant for his uninsured loss,

Coffey v. Polimerii (1951 9th Cir.) 188 F. 2d 539;

Milton v. Granite State Fire Ins. Co. (1952 10th Cir.) 196 F. 2d 988.

Nephew was contradicted (a) by his signed statement dated 1-25-55 that he discussed unoccupancy with Appellant in 1950 (179), whereas such statement stated he didn't remember the season of the year (190), and, (b) by Mrs. Zimmerman that a watchman was to be maintained at all times (149-151), instead of only having someone living on the premises (181).

3. Clara M. Heysler.

She had been an employee of Nephew since 1949 (153), and would have his best interests in mind. She was contradicted (a) by the written applications dated October 29, 1952, she prepared and sent Appellees Girard and National, wherein she did not state there was any unoccupancy or that the packing plant would not be operated (166-167, Ex. C, 160); and (b) by Roy A. McMillan (243-244).

V.

CONCLUSION.

The burden was upon Appellant to prove he occupied the packing plant as required by the insurance contracts. Appellant has admitted that he knew the phrase "occupied" meant that he had to operate the packing plant; otherwise, there would be no insurance protection, or his insurance would be in jeopardy.

The insurance under the insurance contracts was suspended at the time of this fire either because the building in which the fire originated was unoccupied

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CONCLUSION.

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The insurance under the insurance contracts was suspended at the time of this fire either because the building in which the fire originated was unoccupied

for more than 10 consecutive months immediately prior to the fire without any written endorsement permitting unoccupancy beyond such 10 months period; or because a watchman was not maintained at the premises at all times in lieu of such occupancy.

Appellant was chargeable with full knowledge (actual and imputed) that his Nephew Truman B. Stivers' authority, if any, to waive the provisions of the insurance contracts was limited to a writing either in or attached to the policy. The original and renewal policies contained such express limitation. Nephew was Appellant's agent because Appellant made and recognized him as his agent to handle his insurance; further, when Nephew applied to Appellees Queen and State for insurance for Appellant, he applied as Appellant's agent as a matter of law because he was not an agent of Queen or State. Nephew knew the terms of the insurance contracts, and the express limitation on his authority to waive the provisions of such contracts. As Appellant's agent Nephew's knowledge was imputed to Appellant.

There cannot be any waiver of the occupancy provisions because Appellant actually knew and is chargeable with imputable knowledge of the terms of the insurance contracts. One who has such knowledge cannot claim he has been misled. At any time, Appellant could have returned the subject matter of its insurance to its use as an orange packing plant and so restored his insurance; Appellant or his Nephew could have requested written permission to leave it unoccupied beyond the 10 months' period.

Even under Appellant's claim of a watchman's agreement, Appellant did not comply with his oral agreement to keep a watchman at the premises at all times.

Therefore, it is respectfully submitted that the judgment in favor of each Appellee should be affirmed.

Dated, San Francisco, California,
February 1, 1957.

AUGUSTUS CASTRO,
Attorney for Appellees.



No. 15230

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MORGAN STIVERS,

Appellant,

vs.

NATIONAL AMERICAN INSURANCE COMPANY, a Corpora-
tion, *et al.*,

Appellees.

APPELLANT'S REPLY BRIEF.

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FILE

MAR 25 1957

PAUL P. O'BRIEN,

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Appellees.

APPELLANT'S REPLY BRIEF.

Preliminary Statement.

In appellant's opening brief we attempted to set forth in full detail the facts elicited at the trial and the authorities which we believe demonstrate that on the law applicable to those facts:

1. The insured premises were occupied at the time of the fire, and
2. Further, that there was compliance with an agreement by the insured with the insurers acting through their respective agents regarding occupancy.

Appellees have utterly failed to deal with the full facts contained in the transcript and set forth in the opening brief (which facts were in the main undisputed), to directly answer the contentions made, or to analyze or dispute any of the authorities relied upon by appellant.

Appellees contend that there is only one issue before this court, to wit, the sufficiency of the evidence to support the findings that (a) the insurance contracts were suspended by reason of unoccupancy, and (b) Truman B. Stivers was an agent of appellant.*

We submit that this case was not decided by the trial court on the basis of a simple weighing of contradictory evidence. The opinion of the trial court reflects that it was decided upon interpretation of the insurance contracts and the applicable law, and the position of appellant is that the interpretation of the contracts and the law by the court was erroneous.

*Appellees have utilized the technique in their brief herein of continually referring to Truman B. Stivers as "Nephew," apparently attempting to insinuate the existence of some collusion between appellant and Truman B. Stivers. As we pointed out in appellant's opening brief, there is no evidence whatsoever in the record that the placing of the insurance involved in this action was anything other than an arm's length business transaction, in which customary business routine was followed, and the relationship of Truman B. Stivers to the appellant would seem to be wholly immaterial and not properly usable by appellees to attempt to "color" the transaction.

ARGUMENT.

I.

Appellees Have Misstated Facts and Omitted Pertinent Facts.

It would serve no useful purpose to detail once more the evidence set forth in the record and referred to in Appellant's Opening Brief (App. Op. Br. pp. 2-9, 20-28). Appellee's error with respect to the facts is primarily one of omission, based upon their appraisal that the only substantial problem before the trial court was that of weighing conflicting evidence, not of applying law to a substantially undisputed factual situation. Appellees pick and choose certain evidence which they believe favors them, draw their own conclusions therefrom and say there was evidence to support the judgment, turning away from and ignoring the evidence and law which we believe pertinent to a consideration of this cause.

But appellees indulge in misstatement as well. For example, the conclusion that "Appellant has admitted that he knew the phrase 'occupied' meant that he had to operate the packing plant; otherwise, there would be no insurance protection, or his insurance would be in jeopardy" (Br. of Appellees p. 33) is a mischaracterization of appellant's testimony [Tr. pp. 119-120, 125, 128, 143] exemplified by the cross-examination of appellant at page 125:

"Q. Now, did you know prior to this fire that your insurance would be jeopardized if the property was not being operated as a packing plant? A. No, because Truman Stivers at the time the policies were

placed on there and long before that, that there had to be someone living on the property and which we had someone living there.”

Appellees also refer to a provision of the insurance contracts that “Nothing herein contained shall be construed to modify *any provision* or warranty of this policy *requiring* (1) the maintenance of *watchman service*.” (Br. of Appellees, p. 5.) They then argue that “In the absence of a continuous watch, the insurance is suspended during the watchman’s absence.” (Br. of Appellee’s, p. 30.)

In both the decisions cited in support of the contention (*McKenzie v. Scottish Union & Nat’l Ins. Co.*, 112 Cal. 548 and *Delta Lumber and Box Co. v. Lobugh*, 64 Fed. Supp. 51, 52) the courts were dealing with policies containing an express warranty by the insured, to wit, the so-called “watchman’s endorsement,” wherein the assured warranted that during the time the buildings or works were idle or *not in operation* one or more watchman should be on duty constantly day and night. The court recognized in the *McKenzie* case that under California Civil Code, Section 2629 (now Ins. Code, Sec. 533), the insurer would not be absolved by reason of negligence on the part of the watchman. In this case there was no watchman’s endorsement on any of the policies. That express warranty was not exacted, and appellees cannot read the express warranty into the policies.

II.

The Contention That the Premises Must Be in Operation to Be Occupied Is Contrary to the Authorities. It Is Also Contrary to the Parties' Understanding.

A. "Occupied" and "Operated."

Setting aside for the time being consideration of the agreement as to occupancy made by the parties, we think appellees' position, which seems to be that "occupied" is synonymous with "in operation," is contrary to law.

The problems of "operation" and "vacancy and unoccupancy," while related, are clearly distinguishable, and are frequently dealt with in separate portions of, or riders to, a fire insurance policy. They are also separately dealt with by the courts. (See *National Reserve Ins. Co. of Illinois v. Ord* (1941, 9th Cir.), 123 F. 2d 73, 74.) In the authorities cited by appellant in our opening brief, the question of whether the property was in use or operation at the time of the fire did not determine the question of whether the property was occupied. (App. Op. Br. pp. 9, 12-19, 39-43.) Factually, there was no express warranty or requirement of the policies here sued upon that the premises be "used" or "operated"; only that they be "occupied." Furthermore the policies themselves distinguish "use" from "occupancy" in Paragraph 23 of the Building, Equipment and Stock Endorsement, Form 78, which provided in part as follows:

"23 PERMITS AND AGREEMENTS CLAUSE: Permission granted: (a) For such use of the premises as is usual and incidental to the business conducted therein and for existing and increased hazards and for

change in use or occupancy except as to any specific hazard, use, or occupancy prohibited by the express terms of this policy or by any endorsement thereto . . .”

As was stated in *Silver v. London Assurance Corp.*, 61 Wash. 593, 112 Pac. 666, 668:

“It is said that the word ‘occupied’ should be given its ordinary and popular meaning, and, as applied to this building, means such occupancy as ordinarily attends or is exercised over a saloon building while being used as such. The vice of this position is that the policy does not provide that the building shall be devoted to saloon purposes. The words ‘occupied as as a saloon’ are words of description only. As was said in *Burlington Insurance Company v. Brockway*, 138 Ill. 644, 28 N. E. 799: ‘If the company desired to make its liability contingent upon the continued occupancy of the house as a dwelling, it would have been very easy and natural to have stated that among the other conditions expressed.’”

Appellees rely upon *National Reserve Ins. Co. v. Ord*, *supra* (1941, 9th Cir.), 123 F. 2d 73, for the contention that “occupied” here means “operating,” and for the further contention that the meaning of “unoccupied” is clear. (Br. of Appellees, pp. 18, 20.) Yet the facts of the *Ord* case and the problems considered by the Court were quite different from those here presented. In the *Ord* case it was admitted that the packing plant was not occupied, that part of the machinery, motors, conveyances, etc. had been removed by the owners and by theft, that the place had been ransacked by children and had become the abode and sleeping place of tramps, and before the fire the last of the packing equipment had been

removed. With no one living on the property, the Court dealt only with a rider to the policy granting permission "to shut down or cease operations as the occasion may require."

The opinion declared at page 74:

"Insured asks us to construe the words 'shut down or cease operations as the occasion may require' as meaning, in effect, that though there was no operable packing plant in existence, much less one in operation, when the policy was delivered, nor at any time thereafter, which could cease operations or shut down, nevertheless the unoccupied and tramp infested building was insured by the policy. We cannot agree. Insurers were not liable under the policy until it became occupied as a packing plant. Before that time there was no packing plant to 'shut down' or to 'cease operations.'

"We can find no reason to apply the principle that ambiguous phrases in a policy must be construed against the insurer. Here is no ambiguity as to what was to be shut down or cease operations. The permission was not to shut down or cease operations of an empty shed that had no operations whatsoever to shut down, much less packing plant operations. Obviously, the policy cannot be converted into one insuring a structure which never became a packing plant, that is to say, to construe the specific and limited terms of the permission rider as one striking out the clause limiting the insurance to a period during an occupancy as a packing plant."

The Court was there concerned with admitted facts showing no occupancy, and a plant which had been ransacked and was the abode of tramps and was not in operable condition. Such was not the case here where

an operable and fully equipped plant was occupied by a family living on the property, who prevented others from coming on the place and thus served the purpose that this Court believed was necessary in the *Ord* case to cause the premises to be insured. Also, contrary to the implications of appellees, the language of the policies referred to by the Court in the *Ord* case as unambiguous was that concerning the meaning of "shut down or to cease operations."

Nor are the other authorities cited by appellees on this point controlling, since in each case the courts dealt with the factual situation there presented to determine whether the premises were occupied. *Northwestern Nat'l Life Ins. Co. v. McFarlane*, 50 F. 2d 539, cited by appellees as supporting the contention that the packing plant must be in operation, not merely "occupied," does not support that contention, but deals with a residence left vacant, and the question of whether the company had waived the vacancy provisions or was estopped to assert them by reason of representations of the agent. In passing on the latter point, we may note that that case was decided in 1931 and the Court did not apply California law, which holds that a local agent may by parol waive conditions in an insurance policy, or bind his principal to an oral agreement, irrespective of a provision of the policy that any waiver or permission must be in writing. (See App. Op. Br. pp. 28-34.)

The quotation at page 20 of Brief of Appellees from *Sternberg v. Merchants Fire Assur. Corp.* (1934), 6 Fed. Supp. 541, is a quotation of a statement made by the insurer's counsel in that case which the court therein approved without reference to authorities, but the facts

elaborated on by the Court show an aggravated situation in which the trial court found that plaintiff's son, who was supposed to be caretaker, was the incendiary. *Connecticut Fire Ins. Co. v. Buchanan*, 141 Fed. 877, also relied upon by appellees involved express policy provisions insuring a building as "a normal school and dwelling" and "occupied and only while occupied as a normal school and dwelling" and the court pointed out at page 882:

"No one was actually living in the building, and it was not the home or abode of any one who was only temporarily absent."

Foley v. Sonoma County Farmer's Mutual Fire Ins. Co., 18 Cal. 2d 232, a decision for the insured, does not support the proposition that the building must be operated, but merely holds that a dwelling is occupied despite the absence of the owners for 13 days.

B. Appellees' Contention That Occupancy by a Family Living in a Trailer on the Property Does Not Make the Packing House Occupied Is Contrary to Law.

Home Ins. Co. v. Hancock, 106 Tenn. 513, 62 S. W. 145. (House "occupied" by cropper living in rooms about 36 feet from the insured dwelling house.)

Sierra M. S. & M. Co. v. Hartford Fire Ins. Co., 76 Cal. 235. (Mill "occupied" although watchman not in building at time, his absence being at most negligence on part of watchman for which assured not responsible under California Code.)

Here the agreement was that there should be someone living on the property. It would seem unreasonable that such persons should be expected to live in the packing house which was not constructed as a living quarters.

Furthermore, there were several buildings on the property, all covered by the policies, and the Morris trailer was located on appellant's property between the insured buildings where observation of all was possible. [Deft. Ex. 1.]

The two decisions relied upon by Appellees *Rossini v. St. Paul Fire & Marine Ins. Co.*, 182 Cal. 415 and *Farmers Fire Ins. Co. v. Farris*, 224 Ark. 736, 276 S. W. 2d 44, do not support appellees' position.

In the *Rossini* case, the policy contained a provision that the company was not liable for loss while there was kept on the described premises gasoline exceeding one quart. Judgment for the defendant insurer was reversed for various erroneous findings, including a finding that gasoline kept in a tank on a separate lot not owned by insured six feet from the insured building and fourteen feet below the surface violated the policy provision.

We may note that (1) the case did not involve the question of "occupancy"; (2) The decision on appeal was in favor of the insured and the court declared at page 424: "The burden is on the insurer to plead and prove affirmatively that there has been a violation of the provision increasing the hazard"; (3) The agent insurer was aware of the fact that gasoline was kept on adjacent premises which were not owned by the insured at the time of the fire. The decision is clearly one resolving questions in favor of the insured and placing the burden of proof squarely upon the insurer.

The *Farmers* case, involving a house and barn, decided that it was erroneous to instruct the jury that so long as either of two separately insured buildings, a house and barn, was occupied, the other was occupied. The reason given was that the policy spoke specifically of vacancy

of a "described building" rather than vacancy of "premises." The court distinguished an earlier Arkansas case which held the insured was entitled to recover where one of two houses was occupied, on the ground that the policy insured the "premises." (*McQueeney v. Phoenix Ins. Co.*, 52 Ark. 257, 12 S. W. 498.) Here the policies refer variously to "building," "building and contents," "above described premises."

C. The Contention Ignores the Agreement of the Parties.

It would serve no useful purpose to elaborate once more the evidence which shows that appellant in good faith, and pursuant to his understanding with the duly authorized agent for appellees National American and Girard, which information and understanding was imparted to the duly authorized agent for appellees Queen and Pennsylvania, placed a family to live upon the property for the express purpose of keeping his insurance in effect. (App. Op. Br. pp. 6-9, 21-28.)

That agreement was made with full knowledge that the plant was not in operation at the time the insurance was placed and with full knowledge that the property was to be occupied in accordance with the understanding of the parties. The subsequent checking by the agent Truman Stivers to make sure that somebody was living on the property and the fact that Pacific Fire Rating Bureau apparently inspected the property after the placing of insurance at the request of the general agents for National American show a satisfaction by appellees with appellant's performance.

III.

Appellees Fail to Deal With Section 533 of the Insurance Code of the State of California.

Appellees argue that a "watchman" was not maintained at all times. The authorities cited by appellees all involve an express warranty, the so-called "Watchman's Endorsement" which is a standard form in policies in the form of an express warranty to the effect that when the premises are not in operation, day and night watchmen will be required, and requiring certain duties and functions on the part of the watchman.

Here the understanding was that someone would be living on the property with no express warranty as to his duties and functions. It appears that the Morris family did in fact keep interlopers off the property. On the other hand, although Mrs. Morris testified one of the family was there all the time, it appears that on the day of the fire, all three had left their trailer and gone to work.

As was stated in *Sierra M. S. & M. Co. v. Hartford Fire Ins. Co.*, *supra*, 76 Cal. 235:

"To us this seems nothing more than an allegation of negligence upon the part of the watchman, and for this plaintiff was not responsible under section 2629 of the Civil Code." (Cal. Ins. Code, Sec. 533.)

IV.

Under California Law Appellees Were Bound by the Knowledge and Agreements of Their Agents.

We urge that on the evidence it is clear that Truman Stivers and Roy McMillan were duly authorized agents of appellees and were acting as such agents in the placing of this insurance. (App. Op. Br. pp. 20-28.)

The principal thrust of appellees' challenge of our position appears to be based upon the fact that the standard policy contains the following requirement, as set forth in Insurance Code, Section 2071:

“Waiver provisions

“No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this company relating to appraisal or to any examination provided for herein.”

But California law is clear that, despite such provision in the policies, an insurance agent, having authority such as that held by Truman Stivers and Roy McMillan herein, may bind his principal to an oral agreement or waiver irrespective of this provision of the policies. (See authorities cited in App. Op. Br. pp. 28-30.) *Wilson v. Maryland Casualty Co.*, 19 Cal. App. 2d 463, 467, relied upon by appellees, involved

“a soliciting agent and [who] had no authority, actual, or ostensible, to waive any of the conditions of the policy; he had no authority to consummate the

contract and issue a policy of insurance. All the authority he possessed was to take the application, transmit it to the defendant, and when it was returned, deliver it to the plaintiff.”

Neither McMillan or Truman Stivers was so limited. Both held agency agreements and had full power to consummate contracts and to bind their principals to oral agreements.

Conclusion.

Appellees assert a hard doctrine which would deprive an insured of coverage for which he had paid and which he had every reason to expect would be provided. They have not directly answered the contentions of appellant nor have they disputed appellant’s factual statement or his authorities. Instead they seek to withdraw within the rule respecting sufficiency of the evidence and to bring forth authorities which we sincerely believe do not negate appellant’s right to recover.

We therefore respectfully urge that the judgment be reversed.

Respectfully submitted,

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Attorneys for Appellant.

No. 15,230

IN THE

United States Court of Appeals
For the Ninth Circuit

MORGAN STIVERS,

Appellant,

VS.

NATIONAL AMERICAN INSURANCE COMPANY,
a corporation, GIRARD INSURANCE COM-
PANY OF PHILADELPHIA, PENNSYLVANIA, a
corporation, THE INSURANCE COMPANY
OF THE STATE OF PENNSYLVANIA, a corpo-
ration, QUEEN INSURANCE COMPANY OF
AMERICA, a corporation, and Does I to
X, inclusive,

Appellees.

APPELLEES' PETITION FOR A REHEARING.

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FILED

SEP 11 1957

PAUL P. O'BRIEN, CLERK

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IN THE

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Appellees.

APPELLEES' PETITION FOR A REHEARING.

*To the Honorable Chief Judge and to the Honorable
Circuit Judges of the United States Court of
Appeals for the Ninth Circuit:*

This cause was determined in this Court on August 15, 1957. The opinion was written by Circuit Judge Hamley. There were associated with him Circuit Judge Lemmon and Circuit Judge Chambers.

The judgment reversed a judgment, in part, in an action on fire insurance contracts, in favor of the four defendants, and entered on written findings of fact of the trial Court. On appeal Appellant questioned the correctness of the findings of fact of the trial Court that Truman Stivers was an agent for Appellant, and that Appellant had not complied with the occupancy provisions of his insurance contract, on the grounds that under the evidence Truman Stivers was not an agent of Appellant and that Appellant either complied with the occupancy provisions of the policy, or with the occupancy requirement as alleged by Appellant to maintain a watchman on the premises at all times.

Appellees and petitioners National American Insurance Company (National) and Girard Insurance Company of Philadelphia (Girard) ask for a rehearing and re-consideration of their claim that written findings of fact in their favor are supported by the evidence, and that this Court pass upon and settle the important questions of federal practice which the reversal of the trial Court presents:

(1) The proper function of this Court on appeal from a judgment to review the action of the trial Court in making written findings of fact upon conflicting evidence, determining the credibility of witnesses and weighing the evidence, where as here the trial Court properly performed its function, and (2) the consideration which should move this Court, the guides to its action, the limit of its function in re-

viewing written findings of fact and credibility of witnesses where as here a conflict in evidence exists.

It is submitted, with deference, the questions presented are not clearly or correctly passed upon and that the questions, warrant a re-hearing by this Court.

In support of this application, petitioners National and Girard respectfully show:

I.

SUMMARY STATEMENT OF THE CASE.

For purposes of this petition the facts out of which this litigation arose are stated briefly:

Appellant was the owner of an orange packing plant in Tulare County, California, consisting of a packing house and loading platform, equipment, stock including field boxes and supplies, bunk house, and storage building. Effective December 1, 1952, the four Appellees insured Appellant against fire loss to the plant in the aggregate amount of \$40,000 for three years.

On October 13, 1954, fire in the packing house destroyed the insured property except the bunk house. Appellant filed Proofs of Loss in excess of \$40,000. Each Appellee rejected the Proof of Loss received by it on the ground that Appellant had not complied with the occupancy provisions of its policy. Appellant denied such charge and claimed that each Appellee waived the occupancy provisions of the policy. After a non-jury trial, the trial Court entered judgment for Appellees.

No motion for new trial was made by Appellant.

II.

CONSIDERATIONS UNDERLYING THIS PETITION.

The opinion of this Court was unanimous that Appellant did not meet the minimum requirement for occupancy under the policies of insurance and the California law:

“While this seems to be the purport of the California law, it is unnecessary for us to decide whether occupancy of a building for a purpose other than its designed or described purpose inevitably suspends the policy. The decisions reviewed above teach, at the very least, that buildings designed for human occupancy, whatever the purpose, are not ‘occupied’ unless (1) authorized persons are physically present therein for a reasonable portion of the period during which occupancy is required, or (2) if such persons are not present therein during the required period of occupancy, their absence is temporary in nature and consistent with the use of the building for its designed purpose. *This minimum requirement for occupancy was not met in this case.*” (Emphasis supplied.)

Yet, as to these Appellees, this Court reversed the trial Court on the grounds, stated briefly: that under the evidence Truman Stivers was an agent of Appellees, only; according to testimony of Truman Stivers, he advised Appellant that since the packing plant would not be operated as a plant, he should have someone living on the property and the Morris family living in a house trailer constituted occupancy and reasonable surveillance. In effect, by its opinion, this

Court determined for itself questions of fact contrary to conflicting evidence which was before the trial Court.

In findings of fact at Paragraphs XV and XVIII the trial Court found that the packing plant was not occupied as contemplated by Appellant and Appellees:

“It is true that said premises were not occupied as contemplated by plaintiff and National, Girard, State or Queen under said insurance contracts for more than ten (10) consecutive months prior to or at the time of such fire.” (Par. XVIII) (93*)

“It is true that said citrus fruit packing house was unoccupied for more than ten (10) consecutive months prior to said fire and at the time of said fire the insurance under each of said insurance contracts was suspended by reason of such unoccupancy in excess of ten (10) consecutive months.” (Par. XV) (92)

because, in the words of the trial court:

“The factual basis for this argument is that Truman Stivers knew that the citrus plant was not operating and informed the plaintiff ‘that unless he would keep somebody on the property his insurance would be in jeopardy * * * and he should try and keep somebody in there living on the premises.’ (Reporter’s Transcript p. 99) Relying on this statement and to keep the insurance effective the plaintiff obtained a family, Mr. and Mrs. Morris and their son, to live in a trailer alongside the plant. This was not living on the insured premises. (See *Rossini v. St. Paul Fire & Marine Insurance Co.*, 188 P. 564; also Words

*Refers to Transcript page.

& Phrases, Permanent Edition, Vol. 33, p. 353.)
 “Assuming without deciding that the agent, Truman Stivers, had authority, either actual or ostensible, as to two of the policies to permit this substitution of conditions without having a written endorsement attached to the policy, this court finds that the substituted condition was not complied with. From the testimony at the time of trial there is no doubt that the requirement of having someone living on the premises was not fulfilled. The trailer was at least 50 feet from the plant and neither Mr. nor Mrs. Morris had a key to any of the buildings. In addition, Mrs. Morris testified that on the day of the fire no one was present on the premises because they were all at work, which was their customary practice.

“This is not the type of case where a party relied on an agent’s statements waiving a condition of an insurance policy. The plaintiff was apprised of the fact that his insurance would ‘be in jeopardy’ unless a stated condition was complied with, and from all the facts there is no doubt that the requirement was not met. The premises were not occupied as contemplated by the parties.”

It is pointed out, with deference, first, that the opinion of this Court is contradictory when it stated “there is no testimony to indicate that Appellant was advised to . . . direct one of the family to be present at the plant at all times”; while, at another point, the Court stated: “Appellant’s employee participated in this conversation stated, on cross-examination, that what Truman’s employee had said was that there would have to be a ‘watchman’ on the property at all times.”

Second, the Court has overlooked that there was testimony by Appellant in which he admitted that he personally understood that he was to have someone on the property at all times, and he so instructed his foreman:

“Q. (By Mr. Castro). Now, did you tell Mr. Morris or his wife or his boy that they had to spend any particular hours at the packing plant?

A. No, I didn’t talk to them. My cousin was our foreman up there.

Q. You didn’t personally?

A. He made the arrangements with them and *I told him that there had to be someone on the property all the time, which he said either one of this family was there at all times.*

Q. *You told your foreman that there had to be someone on the property at all times?*

A. Yes.” (125) (Emphasis supplied.)

In his complaint, presumably after consultation between Appellant with his counsel, Appellant expressly recognized the requirement of a watchman at all times when he affirmatively alleged that Appellees “consented that the plaintiff maintain a watchman on said premises insured by said policy in lieu of continuous occupancy beyond 10 consecutive months; that pursuant to said agreement of said” . . . Appellees . . . “the plaintiff hired and maintained a watchman on said premises at all times after the issuance of the policy and until said property was destroyed by fire.” (7, 12, 17 and 21).

Likewise, Berenice Zimmerman, whose duties as office manager for Appellant included insurance, admitted:

“Q. (By Mr. Castro). Isn't it a fact that what Mrs. Woods told you was that there would have to be a watchman on the property at all times?

A. Yes. She told me—that was the word she used, watchman at all times.

Q. Then did you tell that to Mr. Morgan A. Stivers, that there would have to be a watchman on the property at all times?

A. Mr. Stivers read my note, sir, and we discussed it.

Q. Then did you call Mrs. Woods back and tell her Mr. Stivers would have a watchman at all times?

A. I called her back and told her he would meet whatever term were necessary to be met in order for the insurance to be put in force.

Q. And did you have in mind at that time what she had told you, that there would have to be a watchman there at all times?

A. I beg your pardon?

Mr. Castro. Will you read the question?”

(Question read.)

“The Witness. I dont quite understand. Did I have in mind?

Q. (By Mr. Castro). You stated that you—you testified that Mr. Stivers had told you that he would comply with all the terms of the policy.

A. Yes. That was his decision.

Q. Was that his decision after you told him there would have to be a watchman there at all times?

A. There would have to be someone on the property at all times.

Q. Did you use the term ‘watchman’?

A. To be very honest, I couldn't say. It has been three years since I had the conversation.

Q. Did you write the words down?

A. I wrote the word 'Watchman', yes.

Q. I show you this memorandum book which you have.

A. I am familiar with that.

Q. You have refreshed your memory from it and it uses the term 'watchman', does it not?

A. Yes.

Q. That term 'watchman' is in your own handwriting?

A. That is true.

Q. Then that is what you told Mr. Morgan A. Stivers, a watchman would be required, and so on?

A. Yes. It is in the notes." (149-150)

Contrary to the opinion of the Court that "we find nothing in the record to indicate that Truman's advice to Appellant required that the family live in one of the buildings," Appellant on direct examination, told the trial Court that they had to have someone living at the specific part of the property known as the "packing house":

"Q. (By Mr. Stump). At the time of this conversation, Mr. Stivers—I am sorry but I can't hear you, sir, when you answer. If you will tell us what this conversation was.

A. Well, the best I recall it was about the—we weren't going to operate the packing house any more and I told him of course that we didn't know whether we would ever operate it any more and I believe he said at that time, 'You will have

to keep someone on the property if it is not in operation,' which we did have someone living on the property and had them there all the time.

Q. You thereafter had someone living on the property, is that what you said?

A. Yes.

The Court. Which part of the property?

The Witness. Well, living *at the packing house*. He told me that for our insurance to be in force that there had to be someone living on the property." (118, 119) (Emphasis supplied.)

Also, Truman Stivers testified that he informed Appellant that he would have to keep someone in the packing house:

"Q. And had you had any occasion after writing the first policies and between that time and renewing the second policies to discuss with Morgan Stivers or any representative of his, the fact that this plant was not occupied?

A. Yes. I am inclined to say quite often on business of my own. We have ranches there and I would make it a point to drive by the packing house to see that things were in order and on occasion I found that the people that were living in the plant, occupying it, had moved and I would bring this to the attention of Morgan Stivers and then he would see that somebody *would be located in the property*.

Q. And that was prior to issuing these second policies, is that right?

A. Yes, sir.

Q. And you knew for several years prior to issuing the second policies, the policies in 1952, that the plant had not been operated as such?

A. I knew it for more than a year, yes.

Q. And did you at any time have a conversation with Mr. Stivers regarding the necessity for having someone living on the premises in lieu of occupancy?

A. Yes, I did.

Q. Can you recall what you told Mr. Stivers at that time?

A. The exact words, no, but the conversation was to the effect that unless he would keep somebody on the property his insurance would be in jeopardy—if it were vacant for a certain length of time he would be putting his insurance in jeopardy and he should try and *keep somebody in there living on the premises.*” (p. 180) (Emphasis supplied.)

So there was substantial evidence for the trial Court’s finding that Appellant was directed to have a watchman on the property at all times, and in the packing house. The trial Court in the exercise of its primary function of findings of fact, weighed conflicting evidence and determined the credibility of witnesses and found in favor of the conclusion that a watchman was required at all times.

The significance of the admitted absence of the Morris family daily, is demonstrated by these facts:

The insured premises was in an unprotected fire area (231) along a railroad right of way, where strangers sought entrance during the day as well as at night (222).

The fire occurred at the packing house about 12 noon, and burned until it was discovered by a neighbor,

Edward L. Myers, who was working 2 to 3 miles from the packing plant (201), when the Morris family, including their 16 year old son, were away working in another packing house at Porterville, California (226). For the month and half they lived in the trailer, the entire Morris family were away from the packing plant from 6 or 7 A.M. to 3 to 5 P.M. daily (202), and had not entered the packing house.

It is reasonable to point out that if someone had been at the packing house, the fire might not have started, or it would have been discovered early enough to control its spread or protect the insured property and reduce the amount of damage.

So, again, there was substantial evidence for the trial Court's findings that under the hazardous circumstances of this risk, Appellant did not occupy the premises as contemplated by Appellees and Appellant.

Finally, the burden was upon Appellant to prove the occupancy as required by the policy, or as allegedly modified, and there was no burden upon Appellees to prove unoccupancy.

Rizzutto v. Nat'l Reserve Ins. Co. (1949), 92 C.A. 2d 143, 206 P. 2d 431.

The trial Court found that Truman Stivers was acting as a dual agent of Appellant and Appellees (Par. II (d), IV, V, VI and VII, 86-89).

The opinion of this Court was that such findings could not be supported by the evidence in that when Appellant admitted that Truman Stivers was his agent for handling his insurance "Appellant did not

mean that he accepted Truman Stivers as his agent in that the acts or omissions of Truman Stivers would bind Appellant, but that he was referring to Truman Stivers "in the same sense as he would have said 'our newsboy,' 'our grocer,' or 'our doctor'." The testimony was:

"Q. Mr. Stump, your nephew is Truman B. Stivers?

A. Yes.

Q. And he became an insurance agent and went into the insurance business, did he, eventually?

A. Yes, he did and he wrote practically all of our insurance for several years.

Q. And he acted as an agent for you, did he, in taking care of your insurance?

A. Yes.

Q. And that is true up to the time of this fire and up to the present time, I assume?

A. Yes."

Appellees propounded the interrogatories in the sole specific sense that Truman Stivers as agent of Appellant was authorized to bind Appellant by his acts or omissions. There was neither any objection to either the interrogatory or a motion to strike the answer, nor was any testimony offered by Appellant on redirect examination or otherwise, that he was referring to Truman Stivers in the sense alleged by this Court.

III.

IN THIS CASE, THE COURT HAS ERRONEOUSLY RETRIED ISSUES OF FACT, REJUDGED THE CREDIBILITY OF WITNESSES AND THE WEIGHT OF THE EVIDENCE.

While it is conceded under Rule 52 (a) of the Federal Rules of Civil Procedure this Court has a right to reverse the judgment of a trial Court when a finding of fact is "clearly erroneous," it is equally true that the trial Court is the trier of the facts, and the judge of the credibility of the witnesses and of the weight of the evidence. As expressed in *Noland v. Buffalo Ins. Co.* (1950 Cir. 8th) 181 F. 2d 735, 738:

"(2) The District Court was the trier of the facts, and the judge of the credibility of the witnesses and of the weight of the evidence. The court was not compelled to believe evidence which to it seemed unreasonable or improbable, or to accept as true the uncorroborated evidence (even though uncontradicted) of the insured and his wife, who were interested witnesses. *Rasmussen v. Gresley*, 8 Cir., 77 F. 2d 252, 254; *Yuttermann v. Sternberg*, 8 Cir., 86 F. 2d 321, 324, 111 A.L. R. 736; *Elzig v. Gudwangen*, 8 Cir., 91 F. 2d 434, 440-444; *Hoyt v. Clancey*, 8 Cir., 180 F. 2d 152, 155.

(3) This Court will not retry issues of fact or substitute its judgment with respect to such issues for that of the trial court. *Cleo Syrup Corporation v. Coca-Cola Co.*, 8 Cir., 139 F. 2d 416, 417-418 150 A.L.R. 1056, and cases cited; *Pendergrass v. New York Life Insurance Co.*, 8 Cir., 181 F. 2d 136. Under Rule 52 (a) of the Rules of Civil Procedure for the United States District Courts, 28

U.S.C.A., 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' A reversal of this case would be virtually equivalent to instructing the trial court to accept as true and reliable, evidence which it evidently did not regard as either credible or convincing.

(4, 5) This is not a case in which the plaintiff was entitled to judgment as a matter of law. Had the case been tried to a jury, a verdict for the defendant on the fact issues would have been conclusive. We think the finding of the District Court that the insured had failed to sustain the burden of proving the amount of his loss is conclusive, whether correct or incorrect. See *Cleo Syrup Corporation v. Coca-Cola Co.*, supra, page 417 of 139 F. 2d; *Larson v. Domestic and Foreign Commerce Corporation*, 337 U.S. 682, 695, 69 S.Ct. 1457. Appellate courts should be slow to impute to trial courts a disregard of their duties and responsibilities or a want of diligence or perspicacity in evaluating the credibility of witnesses and the weight of evidence."

Lincoln Life Ins. Co. v. Mathison (1945 Cir. 9th) 150 Fed. 2d 292, 295;

Gates v. Gen. Cas. Co. of America (1941 Cir. 9th) 120 Fed. 2d 925, 927.

A finding of fact is not clearly erroneous "unless it is without adequate evidentiary support or results from a misconception or misapplication of the law."

Hudspeth v. Esso Std. Oil Co. (1948 Cir. 8th) 170 Fed. 2d 418, 420.

It is well established that words of an insurance contract are to be construed in their ordinary sense.

Mass. Mut. Life Ins. Co. v. Pistolesi (1947 Cir. 9th) 160 Fed. 2d 668, 669—term “contusion”;

American Motorist Ins. Co. v. Moses (1952) 111 C.A. 2d 344, 347; 244 P. 2d 760—term “truckman.”

and even “the fact that the bargain is a hard one will not deprive it of validity.”

Standard Acc. Ins. Co. v. Unget (1952 Cir. 9th) 197 Fed. 2d 104;

Greenberg v. Continental Cas. Co. (1938) 24 C.A. 2d 506, 514; 75 P. 2d 644.

The question of whether terms were used in their ordinary, every day sense, such as a “watchman” being a person “set to watch or guard a building”; or an “agent” in the sense that the person has the power to bind or act for a principal, are questions of fact, which the trial Court resolved against Appellant.

The question of whether a watchman maintained a “reasonable surveillance” as stated by the opinion was a question of fact on which the trial Court made a contrary finding.

See:

Kelley v. Hodge Transportation System (1925) 197 Cal. 598, 608; 242 P. 76—meaning of reasonable man;

Kenniff v. Caulfield (1903) 140 Cal. 34, 41; 73 P. 803, 805—meaning of reasonable search;

Richmond v. Sacramento Valley Railroad Co.

(1861) 18 Cal. 351—meaning of due care;

75 Corpus Juris Secundum 634-638, note 90,
which lists many examples of the term “reasonable” reiterating it is a question of fact.

What Appellant meant when he admitted Truman Stivers took care of his insurance as Appellant’s agent involved a question of fact, which the trial Court resolved against Appellant.

Rankin v. Brown (1933) 131 C.A. 137, 20 P. 2d 954.

While the opinion of the Court refers at length and appears to accept the testimony of Truman Stivers, Appellant and Ruby Morris, as true, the trial Court was the judge of the credibility of Truman Stivers, Appellant and Ruby Morris, whose testimony conflicted with the quoted and other testimony before the trial Court. It was the primary function of the trial Court to weigh the testimony that conflicted with Truman Stivers, Appellant and Morris. The trial Court was not compelled to believe the testimony of any of them but could, and did, accept the other testimony which has been quoted in this petition.

Neither was the decision of the trial Court without adequate evidentiary support nor did it result from a misapplication or misconception of the law. This Court agreed that the “minimum requirement for occupancy” under the printed policy and the law of California was not met by Appellant. Up to that point, this Court saw “eye to eye” with the trial Court.

Thereafter, the opinion of this Court does not point out any rule of law that was misconceived or misapplied by the trial Court, and the experienced trial Court was well aware of and properly applied the law against Appellant.

The trial Court accepted the use of the terms "watchman" and "agent" in their every day sense, and determined as a fact, on the testimony of such witnesses as Bernice Zimmerman, Florence Woods Dines and Edward Myers, the admissions of Appellant in his complaint and from the witness stand that Appellant did not occupy the packing plant as contemplated by the Appellees and Appellant.

IV.

CONCLUSION.

It is respectfully submitted that the trial Court properly exercised its function as the trier of the facts, and the judge of the credibility of the witnesses and the weight of the evidence. While this Court, erroneously, has retried issues of fact, the weight of the evidence and substituted its judgment with respect to such issues for that of the trial Court. The action of this Court in exceeding its function has resulted in substantial prejudice, which can and should be corrected.

Dated, San Francisco, California,
September 10, 1957.

Respectfully submitted,
AUGUSTUS CASTRO,
*Attorney for Appellees
and Petitioners.*

CERTIFICATE

I certify that I am the attorney for Defendants and Appellees National American Insurance Company and Girard Insurance Company of Philadelphia in charge of the above entitled cause in their behalf. That I have prepared the foregoing petition for re-hearing, that in my judgment it is well founded and it is not interposed for delay.

Dated, San Francisco, California,
September 10, 1957.

AUGUSTUS CASTRO,
*Attorney for Appellees
and Petitioners.*

No. 15234

United States
Court of Appeals
for the Ninth Circuit

ACME DISTRIBUTING COMPANY, CALI-
FORNIA BEVERAGE & SUPPLY CO.,
and YOUNG'S MARKET COMPANY,
Appellants,
vs.

JOHN COLLINS, doing business as Stan's Stage
Coach Stop, alleged bankrupt,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California, Central Division

FILED

JAN 18 1957

PAUL P. O'BRIEN, CLERK

No. 15234

United States
Court of Appeals
for the Ninth Circuit

ACME DISTRIBUTING COMPANY, CALI-
FORNIA BEVERAGE & SUPPLY CO.,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

CRAIG, WELLER & LAUGHARN

817, 111 West 7th Street,
Los Angeles 14, California

For Appellee:

PATRICIA HOFSTETTER,
GRAINGER, CARVER & GRAINGER,

830 H. W. Hellman Building
354 South Spring St.,
Los Angeles 13, California [1]*

* Page numbers appearing at foot of page of original Transcript of Record.

United States District Court, Southern District
of California, Central Division

No. 67977-Y—Bkey.

In the Matter of JOHN COLLINS, dba STAN'S
STAGE COACH STOP,

Alleged Bankrupt.

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the
22nd day of August, 1955;

Whereas, a petition was filed in this court on the
22nd day of August, 1955, against John Collins,
alleged bankrupt above named, praying that he be
adjudged a bankrupt under the Act of Congress
relating to bankruptcy, and good cause now ap-
pearing therefor;

It is ordered that the above-entitled proceeding
be, and it hereby is, referred to Benno Brink, Esq.,
one of the referees in bankruptcy of this court, to
take such further proceedings therein as are re-
quired and permitted by said Act, and that the said
John Collins, dba Stan's Stage Coach Stop, shall
henceforth attend before said referee and submit to
such orders as may be made by him or by a judge
of this court relating to said bankruptcy.

/s/ BEN HARRISON

District Judge. [2]

[Title of District Court and Cause.]

CREDITORS AMENDED INVOLUNTARY
PETITION

To The Honorable Judges of the District Court of
the United States, for the Southern District of
California:

Permission of the Court having first been obtained, the undersigned petitioning creditors hereby file their amended involuntary petition and allege:

I.

That the alleged bankrupt, John Collins, has had his principal place of business at 13113 San Antonio Avenue, Norwalk, California, and within the Southern District of California and within the judicial district above named, for a period of the greater portion of the six months immediately preceding the filing of this petition, and that said alleged bankrupt is not a municipality, railroad, insurance or banking corporation, or a building and loan association, but is or was engaged in the retail liquor business at the above address.

II.

That your petitioners are creditors of the above [3] named alleged bankrupt and hold provable claims against him, fixed as to liability and liquidated as to amount, amounting in the aggregate in excess of the value of securities held by them in the sum of more than \$500.00.

III.

That the nature and amounts of your petitioners' claims are as follows:

That the alleged bankrupt is indebted to your petitioner, Acme Distributing Co., in the sum of approximately \$417.00 for goods, wares and merchandise sold and delivered by your petitioner to the alleged bankrupt within four years last past, no part of which amount has been paid, and that the whole thereof is due, owing and unpaid, and that at all times herein mentioned your petitioner was, since has been and now is a corporation organized and existing under and by virtue of the laws of the State of California.

That the alleged bankrupt is indebted to your petitioner, California Beverage and Supply Co., in the sum of approximately \$955.00 for goods, wares and merchandise sold and delivered by your petitioner to the alleged bankrupt within four years last past, no part of which amount has been paid, and that the whole thereof is due, owing and unpaid, and that at all times herein mentioned your petitioner was, since has been and now is a corporation organized and existing under and by virtue of the laws of the State of California.

That the alleged bankrupt is indebted to your petitioner, Young's Market Co., in the sum of approximately \$242.70 for goods, wares and merchandise sold and delivered by your petitioner to the alleged bankrupt within four years last past, no part of which amount has been paid, and that the whole thereof is due, owing and unpaid, and that at all times herein mentioned your petitioner was, since has been and now is a corporation [4] organized and existing under and by virtue of the laws of the State of California.

IV.

That within four months immediately preceding the filing of this petition, the bankrupt was insolvent, and on or about August 4, 1955, made or suffered a transfer of his property fraudulent under the provisions of Sections 67 and 70 of this Act, by the means and in the manner hereinafter specifically set forth, namely:

That on or about August 4, 1955, and at which time the bankrupt was insolvent, the bankrupt caused a transfer of a certain on sale general distilled spirits license to one Fred De Carlo without a fair consideration or without any consideration therefor, and which thereby rendered him insolvent, which said on sale liquor license was and is of a reasonable and current market value of between \$4,500.00 and \$5,000.00; that said bankrupt completed the said transfer in so far as any act required of him to do in order to effectuate said transfer, in that on August 4, 1955, and within four months preceding the filing of the petition herein, the bankrupt filed with the California Department of Alcoholic Beverage Control an application for transfer of license duly executed by him and acknowledged before a Notary Public, whereby he transferred said liquor license to the said Fred De Carlo; that said transfer was thereby so far completed that neither the bankrupt nor a bona fide purchaser from him could obtain greater rights in said liquor license than the said Fred De Carlo.

V.

Your petitioners, and each of them, have in writ-

ing authorized Frank C. Weller, an attorney at law and their attorney in these proceedings, for the purpose of convenience and expedition to verify this petition on their behalf. [5]

That attached hereto and marked Exhibits "A," "B" and "C" are full, true and correct copies of the authorizations of your petitioners to the said Frank C. Weller to verify this petition as their agent.

Wherefore, your petitioners pray that service of this petition, together with a subpoena, be made upon said alleged bankrupt as provided in the Acts of Congress relating to bankruptcy, and that he may be adjudged by this Court to be a bankrupt within the purview of this Act.

ACME DISTRIBUTING CO.,

/s/ By FRANK C. WELLER,
Its Authorized Agent.

CALIFORNIA BEVERAGE AND
SUPPLY CO.

/s/ By FRANK C. WELLER,
Its Authorized Agent.

YOUNG'S MARKET CO.,

/s/ By FRANK C. WELLER,
Its Authorized Agent.

CRAIG, WELLER & LAUGHARN

/s/ By THOMAS S. TOBIN,
Attorneys for Petitioning Creditors

Duly Verified. [7]

EXHIBIT "A"

[Letterhead of Acme Distributing Company, 344 South Raymond Avenue, Pasadena, California.]

August 19, 1955.

Frank C. Weller
111 West Seventh St.,
Los Angeles 14, Calif.

Dear Sir:

Re: John Collins, formerly dba Stan's Stage Coach Stop.

This will authorize you as our authorized agent to file an involuntary petition in bankruptcy in the above matter on our behalf.

Yours very truly,

ACME DISTRIBUTING COMPANY
/s/ THOMAS HARALAMBOS,
Thomas Haralambos,
President

TH/a [8]

EXHIBIT "B"

[Letterhead of Young's Market Company, 1610 West Seventh St., Los Angeles 54.]

August 19, 1955.

Frank C. Weller
111 W. 7th Street
Los Angeles, California

Dear Mr. Weller:

Please file an involuntary bankruptcy action

against John Collins, dba Stan's 13113 So. San Antonio, Norwalk, California. This party is indebted to us as follows:

August 18, 1953 Invoice 47838 for	28.86
October 5, 1953 Invoice 71405 for	<u>213.84</u>
	242.70

This is in line with our telephone conversation as of today.

Yours very truly,

YOUNG'S MARKET COMPANY

/s/ E. R. KOCH

E. R. Koch,

Comptroller.

ERK:ed [9]

EXHIBIT "C"

[Letterhead of California Beverage & Supply Co., 1409-21 East Anaheim Street, Long Beach 13, California.]

August 19, 1955.

Frank C. Weller

111 West Seventh Street

Los Angeles 14, California

Dear Sir:

This letter will be your authority to execute in our behalf a petition of involuntary bankruptcy against Mr. John A. Collins of 13113 South San

Antonio Drive, Norwalk, California. The amount of our claim is \$955.16.

Very truly yours,

CALIFORNIA BEVERAGE &
SUPPLY CO.

/s/ HARRY S. KRONICK,
Harry S. Kronick,
Vice President.

HSK/mp

[Endorsed]: Filed Sept. 8, 1955. [10]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME TO
ANSWER OR OTHERWISE PLEAD

It Is Hereby Stipulated By and Between the alleged bankrupt above named and the petitioning creditors on the Creditors' Petition filed against the said alleged bankrupt, that the alleged bankrupt may have to and including the 26th day of September, 1955, within which to answer or otherwise plead to the Creditors Amended Involuntary Petition on file herein.

Dated this 14th day of September, 1955.

PATRICIA J. HOFSTETTER
GRAINGER, CARVER AND
GRAINGER

/s/ By A. O. CARVER

Attorneys for Alleged Bankrupt

CRAIG, WELLER & LAUGHARN

/s/ By THOMAS S. TOBIN

It Is So Ordered. September 16, 1955.

/s/ BENNO M. BRINK

Referee in Bankruptcy

[Endorsed]: Filed Sept. 16, 1955. [11]

[Title of District Court and Cause.]

ANSWER OF ALLEGED BANKRUPT

Comes now John Collins, the alleged bankrupt above named, and answering the Creditors Amended Involuntary Petition filed herein admits, denies and alleges as follows:

I.

Answering Paragraph I of said Creditors Amended Involuntary Petition, the alleged bankrupt herein denies that he has had his principal place of business at 13113 San Antonio Avenue, Norwalk, California, for a period of the greater portion of the six months immediately preceding the filing of said petition and denies that he has had any place of business within said period at all, and in this connection alleges that he has had no place of business and has conducted no business at all since December, 1954.

II.

Answering Paragraph II of said Creditors

Amended Involuntary Petition, the alleged bankrupt herein denies each and every allegation therein contained. [12]

III.

Answering Paragraph III of said Creditors Amended Involuntary Petition, the alleged bankrupt herein denies that he is indebted to Acme Distributing Co., in the sum of \$417.00, or in any other sum for goods, wares and merchandise sold and delivered by it to the alleged bankrupt within four years last past as alleged, or at all, and denies that he is indebted to Acme Distributing Co. in any sum for any purpose, or at all.

Further answering Paragraph III of said Creditors Amended Involuntary Petition, the alleged bankrupt herein denies that he is indebted to California Beverage and Supply Co., in the sum of \$955.00, or in any other sum for goods, wares and merchandise sold and delivered by it to the alleged bankrupt within four years last past as alleged, or at all, and denies that he is indebted to California Beverage and Supply Co. in any sum for any purpose, or at all.

Further answering Paragraph III of said Creditors Amended Involuntary Petition, the alleged bankrupt herein denies that he is indebted to Young's Market Co., in the sum of \$242.70, or in any other sum for goods, wares and merchandise sold and delivered by it to the alleged bankrupt within four years last past as alleged, or at all, and denies that he is indebted to Young's Market Co. in any sum for any purpose, or at all.

IV.

Answering Paragraph IV of said Creditors Amended Involuntary Petition the alleged bankrupt admits that on or about August 4, 1955, he filed with the California Department of Alcoholic Beverage Control a Declaration of Intention to transfer license to Fred De Carlo, but said alleged bankrupt denies each and every other allegation set forth and alleged in said Paragraph IV of said Creditors Amended Involuntary Petition. [13]

Second Defense

Said alleged bankrupt alleges that he was not insolvent at the time of the filing of the original creditors petition and the institution of the proceedings herein.

Wherefore, said alleged bankrupt prays that a hearing may be had on said Creditors Amended Involuntary Petition and this answer, and that the issues presented thereby may be determined by the court.

/s/ JOHN COLLINS

PATRICIA J. HOFSTETTER
GRAINGER, CARVER AND
GRAINGER

/s/ By PATRICIA J. HOFSTETTER
Attorneys for Alleged Bankrupt.

Duly Verified. [14]

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Sept. 24, 1955. Benno M. Brink, Referee. [15]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON INVOLUNTARY PETITION

The involuntary petition in the above entitled matter coming on for hearing before the undersigned Referee in bankruptcy, pursuant to notice of October 20, 1955, at 10:00 A.M., and having been continued to November 3, 1955 at 10:00 A.M., and coming on for hearing before the undersigned Referee at his courtroom in the Federal Building, Los Angeles, in the Southern District of California, the petitioning creditors appearing in person and by their attorneys, Craig, Weller & Laugharn, Thomas S. Tobin of counsel, and the bankrupt appearing in person and by his attorneys, Messrs. Grainger, Carver & Grainger, Adele Carver of counsel, and Patricia J. Hofstetter, and testimony having been taken and the matter having again been adjourned to November 4, 1955, and thereafter by various continued hearings up to and including December 8, 1955, and the testimony having been concluded and various exhibits having been received in evidence on behalf of the petitioning creditors, and the alleged [16] bankrupt under the petitioning creditors' amended involuntary petition and the answer thereto, and the Referee having considered the evidence and being fully advised in the premises, now on motion of Messrs. Craig, Weller & Laugharn, Thomas S. Tobin of counsel, makes the following:

Findings of Fact

I.

The Referee finds that the alleged bankrupt has resided at 10423 East Townley Drive, Whittier, California, and within the Southern District of California, for a longer portion of the six months immediately preceding the filing of the involuntary petition herein than in any other judicial district, and that until on or about December 21, 1954, he was engaged in the retail liquor business at 13113 South San Antonio Avenue, Norwalk, California, and within the Southern District of California; that in the operation of said liquor business said alleged bankrupt incurred liabilities which remain unpaid and are now due and owing.

II.

The Referee finds that the bankrupt at the date of the filing of the petition herein on August 22, 1955, was indebted to the Acme Distributing Co., in the sum of \$417.00 on open account, to the California Beverage and Supply Co. in the sum of \$955.00 on open account, and the Young's Market Co. in the sum of \$242.70 on open account, none of which accounts have been paid.

III.

The Referee finds that the bankrupt was insolvent on August 4, 1955; that he was the owner of a general distilled spirits license issued in his name and of a reasonable market value of approxi-

mately \$5,000.00; that within four months immediately [17] preceding the filing of the involuntary petition herein, and on August 4, 1955, while so insolvent, the bankrupt filed with the Alcoholic Beverage Control of the State of California an application to transfer said liquor license to one Fred De Carlo, a friend, without any consideration whatsoever; that the bankrupt executed all papers necessary to effectuate said transfer, place said liquor license beyond his reach and control, and so far accomplished said transfer that no bona-fide purchaser from the bankrupt could obtain greater rights in said on-sale general distilled spirits license than the transferee thereof, Fred De Carlo.

IV.

That the Referee finds that the bankrupt is insolvent; that all of his assets, including property which would be exempt under the laws of the State of California, taken at a fair valuation, total in value the sum of \$7,068.75, and the bankrupt's total liabilities as of the date of the filing of the involuntary petition herein amounted to, and do now amount to, the sum of \$8,867.23.

Based on the foregoing findings of fact, the Referee makes the following

Conclusions of Law

I.

That the petitioning creditors have sustained the burden of proof required of them under Section 3

of the National Bankruptcy Act, and that the alleged bankrupt should be adjudged to be a bankrupt under the provisions of Section 4-b of the National Bankruptcy Act.

Let an order be entered accordingly.

Dated this 16th day of December, 1955.

/s/ BENNO M. BRINK

Referee In Bankruptcy

[Endorsed] : Filed Dec. 16, 1955. [18]

[Title of District Court and Cause.]

ORDER ADJUDGING ALLEGED BANKRUPT TO BE A BANKRUPT

An involuntary petition having been filed against the above named alleged bankrupt on August 22, 1955, and an answer thereto having been filed, and the above entitled matter having been referred to the undersigned Referee in bankruptcy for determination, and having been duly set for hearing pursuant to notice on November 3, 1955, and having been adjourned from time to time in the taking of testimony and evidence, the petitioning creditors having appeared by Messrs. Craig, Weller & Laugharn, Thomas S. Tobin of counsel, and the alleged bankrupt having appeared in person and by his attorneys, Messrs. Grainger, Carver and Grainger, Adele Carver of counsel, and Patricia J. Hofstetter, and said trial having concluded on De-

ember 8, 1955, and the Referee having made and entered his findings of fact and conclusions of law, and being fully advised in the premises, now on motion of Messrs. Craig, Weller & Laugharn, Thomas S. Tobin of counsel, attorneys for the petitioning creditors, it is

Ordered, Adjudged and Decreed that John Collins, doing [19] business as Stan's Stage Coach Stop, be and he hereby is adjudicated a bankrupt within the purview of Section 4, Subd. (b) of the National Bankruptcy Act.

Done at Los Angeles, in the Southern District of California, this 16th day of December, 1955.

/s/ BENNO M. BRINK,
Referee in Bankruptcy [20]

[Endorsed]: Filed Jan. 5, 1956.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW OF ORDER OF ADJUDI-
CATION

To the Honorable Leon R. Yankwich, Judge of the
above entitled Court:

I, Benno M. Brink, one of the Referees in Bankruptcy of said Court, before whom the above-entitled matter is pending under an order of general reference, do hereby certify to the following:

John Collins, the bankrupt herein, has duly filed

his petition for the review of an Order made by your Referee in this matter on December 16, 1955, in which he adjudged the said Collins a bankrupt in an involuntary proceeding which had been commenced against him.

The Proceedings

This case involves a liquor license which Collins [21] owned and which it was asserted he transferred without consideration, on August 4, 1955. If such transfer was so made, and if at the time Collins was insolvent or if the transfer made him insolvent, there was committed a clear act of bankruptcy under section 3(a)1 of the Bankruptcy Act.

The case began by the filing of a petition in involuntary bankruptcy on August 22, 1955. On August 30, 1955, Collins filed his motion to dismiss the said petition. Thereafter, on September 6, 1955, an amended petition was filed. Collins filed an answer thereto on September 24, 1955, and thereafter the matter was heard before your Referee. At the conclusion of the hearing your Referee ruled that the amended petition had been sustained; that Collins had transferred the liquor license here involved, without consideration; and that at the time of the transfer he was insolvent.

Thereafter, counsel for the petitioning creditors submitted a draft of findings of fact and conclusions of law in the matter, and on December 14, 1955, Collins filed an exception thereto. Thereafter, your Referee rewrote a portion of the findings to

meet the exception which Collins had asserted, and on December 16, 1955, the findings of fact and conclusions of law were filed. On the same day an order of adjudication was entered, and it is from the said order that this review is taken.

The Questions Presented

The questions presented by this review are set forth in detail in the Petition for Review which is going up with this Certificate, but, in the opinion of your Referee, the said questions may be summarized as follows:

1. Did Collins transfer the liquor license here in question?
2. If Collins transferred the license, did he do so without consideration? [22]
3. If Collins transferred the license, and if he received no consideration therefor, was he insolvent at the time of the transfer?

The Evidence

The evidence in this matter will be found in the Reporter's Transcript of the proceedings which were had and in the exhibits, all of which are going up with this Certificate.

Referee's Findings of Fact, Conclusions of Law, and Order

The original of your Referee's Findings of Fact and Conclusions of Law in this matter is transmitted herewith. The original of the Order of Adjudi-

cation will be found in the Clerk's file in this proceeding.

Papers Submitted

The following papers are herewith transmitted:

1. Creditors' Involuntary Petition, filed Aug. 22, 1955.
2. Motion by Alleged Bankrupt to Dismiss Creditors' Petition, filed Aug. 30, 1955.
3. Creditors Amended Involuntary Petition, filed Sep. 6, 1955.
4. Answer of Alleged Bankrupt, filed Sep. 24, 1955.
5. Demand to Produce Documents, filed Nov. 10, 1955.
6. Exception To and Proposed Finding No. 1, filed Dec. 14, 1955.
7. Findings of Fact and Conclusions of Law on Involuntary Petition, filed Dec. 16, 1955.
8. Petition for Review, filed Dec. 27, 1955.
9. Reporter's Transcript of Testimony of John Collins, Sep. 6, 1955, filed Sep. 13, 1955. [23]
10. Reporter's Transcript of Proceedings of Nov. 4, 1955, filed Nov. 10, 1955.
11. Reporter's Transcript of Proceedings of Nov. 14, 1955, filed Nov. 21, 1955.
12. Reporter's Transcript (Partial) of Proceedings, December 5th, 6th, 8th, 1955, filed Dec. 19, 1955.

13. Exhibits—

Petitioning Creditors' Exhibits 1-10, inclusive.
Bankrupt's Exhibits 1-14, inclusive.

Respectfully submitted this 6th day of January,
1956.

/s/ BENNO M. BRINK,

Referee in Bankruptcy [24]

[Endorsed]: Filed Jan. 6, 1956.

[Title of District Court and Cause.]

ORDER REMANDING MATTER TO
REFEREE

The Petition for Review of Order adjudicating the bankrupt a bankrupt having come on regularly to be heard on the 13th day of February, 1956 at the hour of 10 a.m. of said day before the Honorable Leon R. Yankwich, Federal Judge; Patricia Hofstetter and Grainger, Carver and Grainger (A. O. Carver, of counsel) appearing for the bankrupt and Craig, Weller & Laugharn (Thomas S. Tobin, Esq., of counsel) appearing for the petitioning creditors, and after hearing the argument of counsel, and it appearing to the Court that there is additional testimony, which is now available, now therefore, no adverse interests appearing,

It Is Ordered that the matter be and it is hereby remanded to Benno M. Brink, Referee in Bankruptcy, and said Referee is hereby instructed to hear the testimony of the wife of bankrupt and

such additional testimony as may be offered as to the circumstances under which the title to the real property now standing of record in the name of the wife of the bankrupt was carried, and said Referee is instructed to make such changes as he may desire in the findings to the Court and make the same, or such other ruling as he deems [25] proper.

Dated: This 27th day of February, 1956.

/s/ LEON R. YANKWICH,
District Judge

Approved as to Form

PATRICIA HOFSTETTER,
GRAINGER, CARVER AND
GRAINGER,

/s/ By A. O. CARVER,
Attorneys for Alleged Bankrupt

CRAIG WELLER & LAUGHARN,
/s/ By THOMAS S. TOBIN,
Attorneys for Petitioning Creditors

[Endorsed]: Filed Feb. 27, 1956.

[Title of District Court and Cause.]

MEMORANDUM UPON REMAND TO HEAR FURTHER TESTIMONY

On February 27, 1956, Honorable Leon R. Yankwich, Chief Judge of this Court, in proceedings then before him for the review of an order of adju-

dication made by this Referee in this matter; made an order remanding the matter to the Referee with instructions (1) to hear the testimony of the bankrupt's wife, and such additional testimony as might be offered with respect to certain real property involved in this proceeding, and (2) "to make such changes as he may desire in the findings to the Court and make the same, or such other ruling as he deems proper."

The Referee does not construe the order so made as an order reversing the order of adjudication. Rather, it is the Referee's opinion that it was the intent of the Chief Judge simply to remand the matter to the Referee, with leave [27] to take any action he might deem proper after hearing such further testimony as might be offered.

In his Findings of Fact in this matter the Referee found that the bankrupt was insolvent when he made a certain transfer hereinafter mentioned. In arriving at such finding the Referee had ruled that the real property occupied by the bankrupt and his family as their home was the separate property of his wife, and that he had no interest therein.

On March 14, 1956, the Referee heard further evidence in the case consisting of the testimony of Ada Collins, the wife of the bankrupt, with respect to the circumstances under which the title to the aforesaid property was taken in her name. The said testimony corroborated, in substance, the testimony previously given by the bankrupt that although title to the property was taken and remains in the name of the wife, that it was purchased with com-

munity assets, and that there never was any intention that it should be the wife's separate property. In other words, the testimony is that the bankrupt did not make a gift to the wife of the community assets which were used to purchase the property, and that the said property at the date of the said transfer was the community property of the bankrupt and his wife.

The Referee finds the aforesaid testimony of both the bankrupt and his wife to be entirely self-serving and unworthy of belief by this Court. We have here a flagrant situation. The bankrupt transferred a liquor license of a value of approximately \$5,000.00 without any consideration whatsoever. If he was insolvent on the date of the transfer the order of adjudication in this case was proper. If he was solvent it was improper. If the property here in question was community property, the bankrupt was solvent; if it [28] was the separate property of the wife, as it is presumed to be under the provisions of Section 164 of California's Civil Code, he was insolvent.

It is obvious that John Collins does not want to be adjudged a bankrupt. Hence it served his purpose to testify as he did and it is the opinion of the Referee that the wife, in her testimony, simply went along with him.

We are concerned here with an item of property which has been placed beyond the reach of a Trustee in Bankruptcy by the recordation of a declaration of homestead. It would likewise be beyond the

reach of creditors outside of bankruptcy. Therefore, the bankrupt and his wife are perfectly safe and secure in testifying to facts which might support a finding that the property is community property. If any interest the bankrupt might have in the property would be non-exempt in this proceeding, or subject to the claims of creditors outside of bankruptcy, it is the definite opinion of the Referee that the testimony of the bankrupt and his wife would have been much different than it was.

It is the judgment of the Referee that there is no credible evidence to overcome the legal presumption of separate property on the part of the wife in this case. Hence the ruling in that connection heretofore made must stand, and the finding of insolvency must remain as it is.

Therefore, there is nothing for the Referee to do, save to certify the matter back to the Chief Judge for such further proceedings as may be appropriate in the matter.

Dated: March 28, 1956.

/s/ BENNO M. BRINK,

Referee in Bankruptcy [29]

[Endorsed]: Filed March 28, 1956.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE UPON REMAND
TO HEAR FURTHER TESTIMONY

To the Honorable Leon R. Yankwich, Chief Judge
of the United States District Court, for the
Southern District of California:

I, Benno M. Brink, one of the Referees in Bankruptcy of said Court, before whom the above entitled matter is pending under an order of general reference do hereby certify to the following:

On February 27, 1956, your Honor in proceedings for the review of an order of adjudication made by your Referee in this matter, made an order remanding the matter to the Referee, with instructions (1) to hear the testimony of the bankrupt's wife, and such additional testimony as might be offered with respect to certain real property involved in this proceeding, and (2) "to make such changes as he may desire in the findings to the Court and make the same, or such other ruling as he deems proper." [30]

Pursuant to the said order your Referee heard further testimony in this matter on March 14, 1956, and, on March 28, 1956, he filed his Memorandum in connection therewith.

The purpose for which the aforesaid order of remand was made having been accomplished, your Referee now transmits to your Honor the following papers:

1. Memorandum upon Remand to Hear Further Testimony, filed March 28, 1956.

2. Reporter's Transcript of proceedings of March 14, 1956, filed March 27, 1956.

Respectfully submitted this 28th day of March, 1956.

/s/ BENNO M. BRINK,
Referee in Bankruptcy

[Endorsed]: Filed March 28, 1956. [31]

[Title of District Court and Cause.]

MEMORANDUM OPINION ON PETITION FOR REVIEW

Yankwich, Chief Judge.

On September 6, 1955, the amended involuntary petition was filed by certain creditors asking that John Collins doing business as Stan's Stage Coach Stop, be adjudged a bankrupt because while insolvent on or about August 4, 1955, he made or suffered a fraudulent transfer of his property under the provisions of Section 67 [11 U.S.C.A. §107] and Section 70 [11 U.S.C.A. §100] of the Bankruptcy Act. The alleged act of bankruptcy of which the Referee found the debtor guilty is stated in the Amended Complaint in this manner:

"That on or about August 4, 1955, and at

which time the bankrupt was insolvent, the bankrupt caused a transfer of a certain on sale general distilled spirits license to one Fred De Carlo without a fair consideration or without any consideration therefor, [34] and which thereby rendered him insolvent, which said on sale liquor license was and is of a reasonable and current market value of between \$4500.00 and \$5000.00; that said bankrupt completed the said transfer in so far as any act required of him to do in order to effectuate said transfer, in that on August 4, 1955, and within four months preceding the filing of the petition herein, the bankrupt filed with the California Department of Alcoholic Beverage Control an application for transfer of license duly executed by him and acknowledged before a Notary Public, whereby he transferred said liquor license to the said Fred De Carlo; that said transfer was thereby so far completed that neither the bankrupt nor a bona fide purchaser from him could obtain greater rights in said liquor license than the said Fred De Carlo."

The Referee found these to be true. [Findings III and IV.]

The facts other than insolvency need not detain us. For the entire dispute on review centers on the

finding of insolvency which is challenged as unsupported by the evidence.

After hearing the matter on review, it was remanded by the undersigned to the Referee on February 27, 1956, with direction to hear the testimony of the wife of the bankrupt and such additional testimony as may be offered as to the circumstances in which the real property, the family home, now standing in the name of the wife was placed in her name.

The Referee heard the additional testimony and [35] made his return which, in effect, states that he does not believe the testimony given by John Collins as to the circumstances in which the title to the home was taken in the name of the wife and that his position is not changed from that originally taken, because he is of the view that

“the testimony of both the bankrupt and his wife to be entirely self-serving and unworthy of belief by this court.”

The entire question of solvency turns upon the proposition whether the home occupied by the bankrupt and his family at Whittier, California, was the wife's separate property or not. The findings of the Referee, of course, must be accepted “unless clearly erroneous”. [Federal Rules of Civil Procedure, Rule 52(a), General Order #47] However, if there is no substantial evidence to support it, a finding will not be sustained. [In re Leichter, 3 Cir., 1952, 197 F. 2d 955, 957]

The facts relating to the acquisition of the home are these: On December 7, 1951, the bankrupt's wife, Ada J. Collins, entered into an escrow agreement for the purchase of a residence in Whittier for the sum of \$13,100. \$5,154.00 in cash was to be paid into escrow. The title was to be vested in Ada J. Collins, a married woman. The testimony of the wife shows that she and her husband had recently arrived in California from the East, that they had been married since 1938, that she did not have money at the time of her marriage and earned none after. She opened the escrow and, as she stated:

"It was a matter of convenience so that I could take care of things so that he could go back East to get the money."

Her husband went East to "get the money" because "they would [36] not take a personal check on an out-of-town bank." She does not claim to own the property now, nor has she ever claimed to own it as her separate property. On the contrary, she states:

"We own it together. We don't own anything that way. What belongs to one belongs to the other. We just don't live that way."

The escrow and the deed both designate Mrs. Collins as "a married woman". The words usually put in when it is intended that property be in the name of the wife as her separate property are absent. The escrow clerk who testified at the hearings before the Referee, Temperance Bailey, stated that,

while she did not recall the conversation had with the Collins', it was general practice when the property is taken in the name of one of the spouses as separate property, to insert such a clause and that when this is done, a quitclaim deed by the other spouse is required. Her testimony reads:

“Q. When you request a policy of title insurance in that kind of a situation—where the title is to be vested in a married woman as separate property, do you transmit to the title company any papers in addition to the deed?

A. The deed would contain a clause that it was to be—was deeded to the one, the grantee, the property to be the separate property; but there would be an agreement on the deed, signed by husband and wife that it was to be the separate property of the grantee.

Q. In other words, your custom, then, would be that the husband would sign on the deed itself? [37]

A. Yes; either that or a quitclaim deed, in a separate instrument.

Q. The husband would execute a quitclaim deed?

A. It would be embodied in the instructions.

The Referee: Now, we have the instrument here, as petitioning creditors' exhibit No. 8; and the court finds nothing with respect to the

vesting of the title. You say it would be right on this instrument?

A. Yes."

The creditors' involuntary petition is not directed to the wife. Her testimony stands unimpeached. The facts testified to by the escrow clerk corroborate the wife's statement that this was to be their joint home, was bought from their savings during their married life and that it was not the intention to vest the title in her as her separate property.

The Civil Code of California provides:

"* * * whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, * * *" [California Civil Code, §164]

The presumption is rebuttable. [Wilson v. Superior Court, 1951, 101 C.A.(2) 592, 595] At all times, the intention of the parties at the time governs. And what the courts consider sufficient in one case to prove that the property was community property may not be so considered in others. The California Reports are full of cases on the subject. Illustrative of the view which requires strong proof to [38] overcome the presumption of the deed is Kimbro v. Kimbro, 1926, 199 Cal. 344. At the other end are cases in which the property was held to be community property notwithstanding the fact that it was bought with the separate earnings of one of the spouses. [Estate of Piatt, 1947, 81 C.A.(2) 348,

350-351; Frymire v. Brown, 1949, 94 C.A. (2) 334, 339-340; Geller v. Geller, 1953, 115 C.A.(2) 822, 825]

In all cases of this character, in determining the intention of the parties, the fact that the parties had been married for a long time, that the property was purchased with community funds, and was intended "as home" has great weight. [In re Carlin, 1912, 19 C.A. 168] In the case before us, there is no evidence that at the time of arrival at Whittier in 1951, the husband intended to go into any particular business or that the possible failure in the business was thought of as a means of protecting against failure. So, admitting that Collins' actions in the case justify the Referee in not giving credence to his testimony, that condition does not exist as to the wife. I do not believe we can dispose of her testimony by saying that she

"simply went along with him."

California law does not sanction the old common-law theory that husband and wife are one, so as to exclude or attain the wife's testimony. [People v. Nesselth, 1954, 127 C.A.(2) 712, 717] And the common law which forbade one spouse from testifying for or against the other in an action in which either has an interest has long been abandoned. [See, 58 Am. Jur., Witnesses, §§175-190] So the modern American woman is not supposed to be under her husband's "compulsion" when she testifies for him in an action at law. The disqualification of interested parties as witnesses [39] has not existed in California since 1863. [See, Jones v. Post, 4 Cal.

14; *Gibson v. Kennedy Extension G. Min. Co.*, 1916, 172 Cal. 294, 305.] Nor does it exist at the present time anywhere else in the United States, [58 Am. Jur., Witnesses, §159]

It is the rule of the federal courts that uncontradicted testimony may be disregarded if there are in it inconsistencies, or inherent improbabilities or facts contradict it. [*Quock Ting v. United States*, 1891, 140 U.S. 417, 420-421; *Grace Bros. v. C.I.R.*, 9 Cir., 1949, 173 F. 2d 170, 174] But when such testimony is not inherently improbable or deficient in other respects, it cannot be disregarded merely because given by an interested party. [*Chesapeake & Ohio Ry. v. Martin*, 1931, 283 U.S. 209, 215-216; *Pence v. United States*, 1942, 316 U.S. 332, 339-340; *Nicholas v. Davis*, 1953, 10 Cir., 204 F. 2d 200, 202; *San Francisco Ass'n for the Blind v. Industrial Aid*, 8 Cir., 1946, 152 F. 2d 523]

The case last cited epitomizes the rule in a manner that is very appropriate to the problem before us. There the question was whether the unimpeached testimony of a witness could be arbitrarily disregarded. In answering in the negative, the Court said:

“The credibility of Mrs. Quinan was not questioned. Her testimony was not impeached or contradicted. It cannot be disregarded. *Chesapeake & Ohio R. Co. v. Martin*, 283 U.S. 209, 217, 51 S. Ct. 453, 75 L. Ed. 983” [*San Francisco Ass'n for the Blind v. Industrial Aid*, *supra*, p. 536]

Nicholas v. Davis, *supra*, states the rule when the sole ground for rejecting the testimony is interest in this manner: [40]

“When controlling, positive and uncontradicted evidence is introduced, and when it is unimpeached by cross-examination or otherwise, is not inherently improper, and no circumstance reflected on the record casts doubt on its verity, then under the principles laid down in *Chesapeake & Ohio Ry. Co. v. Martin*, 283 U.S. 209, 215-220, 51 S. Ct. 453, 75 L. Ed. 983, it may not be disregarded even though adduced from interested witnesses.” [Nicholas v. Davis, *supra*, p. 202]

Here the estate was created years before the bankruptcy by persons who were recent arrivals in California, were not familiar with our property laws, and from earnings of the husband who, with his wife, was anxious to establish a home in California for his family. In the circumstances, the bare presumption arising from Section 164 of the California Civil Code is overcome by the uncontradicted fact that the property was purchased with community funds as a home, and was placed in the wife's name “for convenience” only. It is true that the property is homesteaded and is beyond reach of the creditors. But the Bankruptcy Act recognizes homestead rights and other exemptions under state law. [Bankruptcy Act, Sec. 6, 11 U.S.C.A., Sec. 24]

Indeed, it makes it the duty of the Trustee to
“set apart the bankrupt’s exemptions allowed by law, if claimed, and report the items and estimated value thereof to the courts as soon as practicable after their appointment.” [Bankruptcy Act, §47(6), 11 U.S.C.A., §75(6)]

The homestead may be carved out of community property or out of separate property of each of the spouses. [California [41] Civil Code, §1238] When a wife converts her separate property into community property, she loses many of the rights which are incident to her separate ownership, such as non-liability for the husband’s debts and the right to convey the property without the consent of the husband. [California Civil Code, §§162, 171] By contrast, if the property were community property, the husband would have the right of management. [California Civil Code §172(a)] In view of this, it cannot be said that the interest of the wife was such that she stood to gain so much by an adjudication that the property was community property, that her testimony should be rejected. In the light of the facts stated, if, as the Referee says, the wife “went along”, with the husband’s version of the transaction, the inference is inescapable that she did so because it was her and her husband’s intention to hold their home as community property.

We should not retroject to 1951 the “delinquencies” of the husband in this bankruptcy so as to impeach the integrity of a property purchase consummated in 1951, long before the husband failed

in business,—a purchase which was intended to establish a home for the family of the debtor with the savings of thirteen years of married life. It is conceded that if to the assets are added the equity in the house, the alleged bankrupt is not insolvent.

It follows that the Referee was wrong in declining to consider the value of this equity in determining the matter and that his finding of insolvency is clearly erroneous.

The Order of the Referee is reversed.

Dated this 18th day of May, 1956.

/s/ LEON R. YANKWICH,

Chief United States District

Judge

[42]

[Endorsed]: Filed March 16, 1956.

In the United States District Court, Southern
District of California, Central Division

No. 67977-Y

In the Matter of JOHN COLLINS, dba STAN'S
STAGE COACH STOP,

Alleged Bankrupt.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER OF JUDGE REVERS-
ING ORDER OF REFEREE ON REVIEW

The petition of John Collins, bankrupt above named, for review of the order of Benno M. Brink, Referee in Bankruptcy, made and entered in the

above entitled proceedings, entitled "Order Adjudging Alleged Bankrupt to be a Bankrupt" dated the 16th day of December, 1955, having come on duly for hearing after remand on the 14th day of May, 1956, at the hour of 10:00 o'clock in the forenoon of said day, before the Honorable Leon R. Yankwich, District Judge, in his Court Room in the Federal Building, Los Angeles, California, at said hearing, Craig Weller & Laugharn (Thomas S. Tobin, Esquire, of counsel) appearing for the petitioning creditors, and Patricia Hofstetter and Grainger Carver and Grainger (Adele O. Carver, of counsel) appearing for the alleged bankrupt, and after hearing the arguments of counsel, and taking the matter under submission, and being fully advised in the premises, the Court makes its Findings of Fact, Conclusions of Law and Order as follows:

Findings of Fact

I.

[43]

The alleged bankrupt has resided at 10423 East Townley Drive, Whittier, California, and within the Southern District of California, for a longer portion of the six months immediately preceding the filing of the involuntary petition herein than in any other judicial district, and that until on or about December 21, 1954, he was engaged in the retail liquor business at 13113 South San Antonio Avenue, Norwalk, California, and within the Southern District of California; that in the operation of said liquor business said alleged bankrupt incurred

liabilities which remain unpaid and are now due and owing.

II.

The alleged bankrupt at the date of the filing of the petition herein on August 22, 1955, was indebted to the Acme Distributing Co. in the sum of \$417.00 on open account; to the California Beverage and Supply Co. in the sum of \$955.00 on open account, and the Young's Market Co. in the sum of \$242.70 on open account, none of which accounts have been paid.

III.

The real property situate at 10423 East Townley Drive, Whittier, California, being the property in which the alleged bankrupt resides, was purchased with community funds of the alleged bankrupt and his wife, Ada Collins, and is community property of the alleged bankrupt and his wife. Title to said property was taken in the name of Ada Collins, the wife of the alleged bankrupt, for convenience only. The alleged bankrupt and his wife did not intend, and there was no intention on their part, that said property become the separate property of the wife. The value of the equity of the alleged bankrupt and his wife in and to said real property is \$6000.00, and such equity is a portion of the assets to be taken into consideration in determining the solvency or insolvency of the alleged bankrupt.

IV.

The alleged bankrupt was not insolvent on the 4th [44] day of August, 1955. On August 4, 1955,

the alleged bankrupt was the owner of a general distilled spirits license issued in his name and of a reasonable market value of approximately \$5000.00. On said date the alleged bankrupt filed with the Alcoholic Beverage Control of the State of California an application to transfer said liquor license to one Fred De Carlo without consideration. Said application to transfer is still pending.

V.

The alleged bankrupt was not insolvent on the 22d day of August, 1955, the date of the filing of the involuntary petition in bankruptcy against him. At said time all of his assets, including property which would be exempt under the laws of the State of California, but excluding said distilled spirits license, taken at a fair valuation, total in value the sum of \$13,068.75, and the alleged bankrupt's total liabilities as of the date of the filing of the involuntary petition against him amounted to, and do now amount to, the sum of \$8867.23.

Conclusions of Law

Based on the foregoing Findings of Fact, the Court makes the following conclusions of law:

I.

The alleged bankrupt was solvent on the 4th day of August, 1955, and was solvent on the 22d day of August, 1955, and did not commit the alleged act of bankruptcy, or any act of bankruptcy, and should not be adjudged a bankrupt.

II.

The petitioning creditors have not sustained the burden of proof required of them under Section 3 of the Bankruptcy Act, and the alleged bankrupt should not be adjudged to be a bankrupt.

Order

Wherefore, It is Ordered, Adjudged and Decreed that the order of the Referee dated the 16th day of December, 1955, adjudging [45] the alleged bankrupt to be a bankrupt be, and the same hereby is reversed, and the Order of Adjudication entered pursuant thereto be, and the same hereby is vacated and set aside, and the alleged bankrupt be, and he hereby is decreed to be not bankrupt.

Dated this 3rd day of July, 1956.

/s/ LEON R. YANKWICH,
District Judge

PATRICIA HOFSTETTER,
GRAINGER, CARVER AND
GRAINGER,

/s/ By A. O. CARVER,
Attorneys for Alleged Bankrupt [46]

Affidavit of Service by Mail Attached. [47]

[Endorsed]: Filed July 3, 1956. Docketed and Entered July 5, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Acme Distributing Company, California Beverage & Supply Co. and Young's Market Company, petitioning creditors herein, do hereby appeal from the order of Honorable Leon R. Yankwich, United States District Judge, reversing the order of Honorable Benno M. Brink, Referee in Bankruptcy, which adjudicated the alleged bankrupt, John Collins, to be a bankrupt, and from the findings of fact and conclusions of law on which said order was based.

Said appeal is taken to the United States Court of Appeals for the Ninth Circuit.

Dated at Los Angeles, California, this 10th day of July, 1956.

CRAIG, WELLER & LAUGHARN,

/s/ By THOMAS S. TOBIN,

Attorneys for Appellants [48]

[Endorsed]: Filed July 10, 1956.

[Title of District Court and Cause.]

POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL

The appellants herein hereby specify the points on which they intend to rely on appeal in the United States Court of Appeals for the Ninth Circuit:

Point I.

That the District Judge erred in reversing the order of the Referee which adjudicated the bankrupt to be a bankrupt.

Point II.

That the District Judge erred in not confirming the order of the Referee which adjudicated the bankrupt to be a bankrupt.

Point III.

That the District Judge erred in attempting on a cold record to evaluate the credibility of the testimony of the bankrupt and his wife as to the value of the bankrupt's homestead, and in finding that the bankrupt's assets exceeded his liabilities, and in reversing the order made by the trier of fact, the Referee, who had seen the witnesses, heard them testify and [51] judged their credibility.

Dated this 10th day of July, 1956.

CRAIG, WELLER & LAUGHARN,

/s/ By THOMAS S. TOBIN,

Attorneys for Appellants [52]

[Endorsed]: Filed July 10, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of Cali-

fornia, do hereby certify that the foregoing pages numbered 1 to 52, inclusive, contain the original

Order of General Reference;

Creditors Amended Involuntary Petition;

Stipulation Extending Time to Answer;

Answer of Alleged Bankrupt;

Findings of Fact, Conclusions of Law on Involuntary Petition;

Order Adjudging Alleged Bankrupt to be a Bankrupt;

Referee's Certificate for Review of Order of Adjudication;

Order Remanding Matter to Referee;

Memorandum Upon Remand to Hear Further Testimony;

Referee's Certificate upon Remand to Hear Further Testimony;

Notice of Hearing on Petition to Review after Remand;

Memorandum Opinion on Petition for Review;

Findings of Fact, Conclusions of Law and Order of Judge Reversing Order of Referee on Review;

Notice of Appeal;

Designation of Parts of the Record on Appeal;

Points on Which Appellants Intend to Rely on Appeal;

which, together with 5 volumes of reporter's transcript and Creditor's exhibits 1-10, inclusive and bankrupt's exhibit 1, all in the above-entitled cause, constitute the transcript of record on appeal to the

United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and seal of the said District Court this 16th day of August, 1956.

[Seal] JOHN A. CHILDRESS,
 Clerk,
/s/ By CHARLES E. JONES,
 Deputy

District Court of the United States, Southern
District of California, Central Division.

Bankruptcy No. 67,977-Y

In The Matter of JOHN COLLINS, dba Stan's
Stage Coach Stop.

REPORTER'S TRANSCRIPT

Tuesday, September 6, 1955.

Before Hon. Benno M. Brink, Referee

Appearances: For Receiver: Craig, Weller &
Laugharn, by Thomas S. Tobin, Dorothy Kendall.
For John Collins: Patricia J. Hofstetter. [1]*

JOHN COLLINS

being first duly sworn, testified as follows:

The Referee: Will you state your name?

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Testimony of John Collins.)

A. John Collins.

Q. What is your address?

A. 10423 East Townley Drive, Whittier.

Q. Do you have a telephone number?

A. Oxford 97663.

Q. Are you in business at 13113 San Antonio Avenue, Norwalk? A. Not at this time.

Q. Are you in business at any place? A. No.

The Referee: All right; go ahead.

Examination

Q. (By Mr. Tobin): When did you cease doing business at 13113 San Antonio Avenue, Norwalk?

A. Approximately September, 1954.

Q. And what were the circumstances under which you closed that business?

A. Well, there was a dispute between myself and Lefringhouse. He said he was taking the business over.

Q. And you were engaged in the retail sale of liquor? A. That is true.

Q. And cafe? A. A cocktail bar, yes.

Q. Did you have a stock in trade on hand at the time of this dispute? [2] A. Yes, sir.

Q. Open bottles?

A. Yes, sir; some open and some closed.

Q. What became of them?

A. Lefringhouse took the balance and put them in his liquor store. I got a few of the full bottles and some of the partially-full bottles.

Q. And where does this man Lefringhouse live?

(Testimony of John Collins.)

Miss Kendall: He is right here in the court room, and I will produce him at any time.

Q. (By Mr. Tobin): And with regard to the full bottles that you took, where did you take them to? A. I put them in my garage.

Q. And about how many bottles were there and what do they contain?

A. I never assorted them as to fullness; but they contain whisky, wine, beer—any kind of alcoholic beverage.

Q. Approximately how many bottles of whisky were placed in your garage?

A. That would be awful hard to estimate. I would take a guess at maybe 50 or 60 bottles; it could be 40 or 30; but there was beer mixed in with it. There were all kinds.

Q. I was going to take each liquor separately. About how many bottles of whisky?

A. I could not tell you—I really and truly could not tell you. [3]

Q. Is it still there? A. Some of it.

Q. What has become of the rest?

A. I drank a little of it.

Q. Outside of what you drank?

A. It is there in the garage.

The Referee: The question is—have you sold any? A. No, sir.

Q. Have you given any away?

A. There is parties and stuff—I invite people to my home.

(Testimony of John Collins.)

Q. Have you given any of it away to people to take away?

A. At Christmas time I think I did, a bottle or two as Christmas presents.

Q. (By Mr. Tobin): When did you put it in the garage?

A. It was in December.

Q. 1954?

A. That's right.

Q. And it has remained in your garage ever since?

A. Some of it I drank; the balance of it is in the garage.

Q. I am not trying to hold you to any that you personally consumed in your own family.

A. It is in the garage.

Q. It has not been in any place of business after December, 1954?

A. No.

Q. It has not been in your place of business, where [4] you yourself conducted a business since December, 1954?

A. The portion I received has not been; it has been in my garage.

Q. About what would you say is the value of that liquor that is in your garage?

A. I don't know; it would be hard to estimate because it is in bottles of whisky and beer—they are not much different in size but there is in the cost. I really could not tell you the estimated cost.

Q. Would you say \$500?

A. No.

Q. Four hundred dollars?

A. It could be, but I would doubt it.

(Testimony of John Collins.)

The Referee: I don't think the witness is in position to answer that question.

Q. (By Mr. Tobin): How long have you lived in southern California?

A. As a permanent address, about October, 1951, I think.

Q. Did you ever live in New York?

A. I did.

Q. When?

A. Well, I was born there—that is New York State.

Q. Did you ever live in New York City?

A. No.

Q. Did you ever live in Niagara Falls, New York? A. I did.

Q. Did you have a bank account back there?

Miss Hofstetter: Objected to unless he gives us a foundation. [5]

The Referee: Well, on August 22, 1955, when this petition was filed, did you have a bank account in Niagara Falls, New York?

A. I don't believe so. If there was one there it would have less than five dollars. There could be one. We drew the money out a long time ago, when we moved here; but it seems to me—I thought the account may have—there is still a few cents in the account. We would not know the exact amount of the balance.

Q. When did you make the last substantial withdrawal from the bank account in Niagara Falls?

A. I would say about 1953.

(Testimony of John Collins.)

Q. What was the name of the bank?

A. There were several—Power City Trust Company; Niagara Permanent Savings & Loan Association. I think I had a small account in the Manufacturers & Traders Trust, but if there was it was small.

Q. Were those in Niagara Falls?

A. Yes; they were there before I moved.

Q. I would like to identify the place; is the City called “Niagara Falls”? A. Yes.

Q. In what name or names were those accounts kept? A. “John A. Collins.”

Q. Anyone else? A. No.

Q. Are you a married man?

A. My wife could have been. I would not know.
[6] Very likely it could be “Eda J.”

Q. Were any of those accounts in the name of any business?

A. At the time of August 22, 1955?

Q. Yes. A. No.

Q. (By Mr. Tobin): Did you make any deposit in those accounts after you came out here?

A. I really could not say; it has been a long time, and I don't recall any.

Q. Were those checking accounts or savings accounts?

A. Well, offhand, I would say they were checking accounts.

Q. Were those accounts active after you came out here, except from the withdrawal that you have already testified to?

(Testimony of John Collins.)

A. I withdrew several times when I first came out here.

Q. Do you have your bank books?

A. No; I don't.

Q. Do you know where they are?

A. Well, when they are empty there is no sense in saving them. I don't know whether I have them. As I say, I don't recall keeping them.

Q. When did you last receive statements from any of those banks? A. It was a long time ago.

Q. What do you mean?

A. It was way back before 1955, a long time before. [7] Maybe 1952 or 1953.

Q. Approximately what balance did you have in those accounts in 1953?

The Referee: I don't think that is material at this time in light of the alleged bankrupt's answer. Let's go on to something else.

Q. (By Mr. Tobin): Now, outside of the liquor that you have in your garage and whatever balance is in your bank accounts in Niagara Falls, what other property do you have?

A. Well, there is a dispute about the bar fixtures, whether I own them or Stan Lefringhouse. They are still on the premises at 13113 San Antonio Drive, Norwalk.

Q. What are they worth?

A. Well, the fixtures themselves are worth about \$5000 or \$7000.

Q. And are they still in a leased building?

A. No.

(Testimony of John Collins.)

Q. Is there provision in the lease that you know of that they revert to the landlord in the event you are in default in your rent?

A. Not in any lease that I signed.

Q. Who is in possession of that place of business at the present time?

A. Lefringhouse, I believe. He is here in the court room.

Q. Now, at the time that you took that liquor out had you had some kind of settlement with Lefringhouse? A. No. [8]

Q. How did it happen you removed the liquor from the place of business and put it in your garage?

A. Well, in closing the place, he contended that he owned everything; and operating on my liquor license and my fixtures and everything; and walking off with all the money; and so the only thing I could do was to close it.

Q. Did you buy the bar fixtures?

A. It was my money. The bar was made out of material; it was not purchased in a store as a unit or anything.

Q. Who transacted the purchase of the material of the bar fixtures?

A. Some of them I did and some of them Stan Lefringhouse did.

Q. And with whom did you deal?

A. Well, it just depends on what you bought. The beer boxes and stuff like that, the company we bought the beer from.

(Testimony of John Collins.)

Q. Did you buy it? A. I bought it.

Q. You bought it yourself? A. Yes.

Q. Was there an escrow?

A. An escrow on the beer boxes?

Q. On any of the fixtures.

A. Not that I know of.

Q. When you started up? A. No.

Q. When you closed up did you contend that you and he were partners?

A. I did. I presumed that we had better go and see the [9] judge and let the judge decide.

Q. And there is litigation pending on whether or not there was a partnership?

A. That is right.

Q. But you individually have at least several hundred dollars worth of liquor in your garage?

A. Well, there is liquor there; I don't know what the value is. There is liquor—beer and wine, vodka—generally about every alcohol beverage you could think of.

Q. Will there be any difficulty in the receiver going out there and making an inventory?

A. No, as long as he let me know when he is coming.

The Referee: That is reasonable.

Mr. Tobin: Yes. Have you had the automobiles up until recently?

A. Well, in my possession, yes.

The Referee: Tell us about the cars?

A. Here is the thing—in 1951, before I moved here—it was I think—I am not sure—October, or

(Testimony of John Collins.)

in September, my wife bought a new car—a 1951 Chrysler at that time; and I bought a new Buick about two months later. We came here and still have the Chrysler, but the Buick I sold, I think, in 1952, shortly after I came here; and since then I have purchased a Ford.

Q. Let us take the Ford—in whose name was that purchased?

A. I believe it was either mine or my wife's.

Q. You don't know? [10]

A. I don't know—or both.

Q. It is driven by both of you?

A. It is driven by my boy—my son.

Q. Is it clear? A. No; I owe the bank.

Q. About how much do you owe on the Ford?

A. About \$700—for a guess—The Bank of America.

Q. Where? A. Whittier.

Q. Is that money you borrowed on it?

A. Yes.

Q. It was not part of the purchase price?

A. No; it wasn't.

Q. You got some money on it after you bought it? A. Yes.

Q. In whose name is the Chrysler registered?

A. "Eda J."

Q. In your wife's name? A. Yes.

Q. Does she claim it as her own?

A. Well, the situation was—I was going to buy her a cheap car; and her father said he would put in the extra money to buy her a good car.

(Testimony of John Collins.)

Q. In any event she claims it as her own?

A. She says it is.

Q. Is there anything owing on it?

A. Well, they are both on the same loan with the Bank.

Q. The Ford and the Chrysler?

A. That's right.

Q. Is there anything else included in that loan?

A. For collateral, or anything? [11]

Q. Yes. A. No.

Q. Are there any other cars in your family?

A. The boy got a \$15 "heap" the other day.

Q. Outside of the "heap" there is no other car?

A. No.

Q. Is there any other car that any member of the family drives habitually? A. No.

Q. (By Mr. Tobin): Now, referring to this loan that you made at the Bank, did you sign the note for the loan? A. I really don't know.

Q. Did your wife? A. I believe she did.

Q. What branch of the Bank?

A. The Bank of America on Philadelphia and Greenleaf. It is right on the corner there.

Q. By the way, do you own any real estate?

A. I don't know whether I do or not—the house I live in.

Q. Do you have any real estate back in Niagara Falls? A. No, sir.

Q. Standing in any one else's name? A. No.

Q. Do you have a brother back in Niagara Falls by the name of "Lawrence?" A. No.

(Testimony of John Collins.)

Q. Do you have a brother by the name of "Lawrence?" A. Yes.

Q. Where is he? A. California.

Q. Is there any property back in Niagara Falls standing in his name that actually belongs to you?

A. No.

Q. Do you have any property back in Niagara Falls, [12] New York, in anybody else's name?

A. No.

Q. In which you claim an interest?

A. No. I don't know—now—my father died just recently—about 18 months ago, and there is something about the will—the way it was written—my mother got everything, but there is a house in which they lived, and it was his wish that—I can't quote it exactly—but anyway, if the mother died first and he died last, the house would go to the "kids"; and in the event he died first that mother should have the house until she died; but it was his wish that the house be divided among the "kids." I suppose eventually there is something, but right now I would say it was my mother's.

Q. (By the Referee): What was your father's name? A. Charles M.

Q. Where did he die? A. Niagara Falls.

Q. Did he leave a will?

A. I never have seen it, but that is what mamma said.

Q. You don't know whether it was probated?

A. No; this is just what I heard from my mother.

(Testimony of John Collins.)

Q. Outside of any possible interest you might have in the family house, is there any real estate of any kind anywhere in which you claim an interest outside of California?

A. No, nothing, no bank, no money.

Q. In whose name is your home standing?

A. Eda J. Collins.

Q. Is your name on it? A. No. [13]

Q. Does she claim it as her own property, do you know?

A. Well, she says it is. I don't know. We bought it in 1951, when we came here.

Q. Is it clear? A. No.

Q. How much is against it?

A. I couldn't tell you, for a guess, it is about \$4000 to \$7000—somewhere in that area.

Q. What was the original price, approximately?

A. "12-2," I think, or "12-3."

Q. Has anyone declared a homestead on the property?

A. My wife, I think—I think she did, when she bought the house.

Q. Is there any other real estate anywhere in California in which you claim any interest whatsoever? A. No.

The Referee: Go ahead.

Q. (By Mr. Tobin): Now, going back to this Niagara Falls property that you referred to as the "house," was that a dwelling house or apartment house?

(Testimony of John Collins.)

A. Just a plain, one-family house. My mother lives in there now.

Q. Do you own an apartment house? A. No.

Q. You own no interest and claim no interest in an apartment house in Niagara Falls?

A. That is correct. I don't claim any.

The Referee: Where did somebody get the idea, because it is very evident they did, that you might have some interest [14] or claim some interest in an apartment house in Niagara Falls?

A. I will tell you what it is all about—Mr. Forrest, sitting on my right—is of the opinion I must have a bunch of money back in Niagara Falls; and we have been wrangling back and forth in the courts about this liquor bill here; and I guess he just wanted to find out, between himself and Miss Kendall; and they figure that now is a good time to get me upon the stand and ask.

Q. And where did they get the idea you had an apartment house? A. I did have at one time.

Q. How long ago?

A. It was in the forties—I believe in '46 or '47.

Q. What did you do with it?

A. I sold it when I came out here.

Q. Does it still have a trust deed or mortgage on it?

A. No; it is all done—I have no attachment to it or anything.

Q. (By Mr. Tobin): Are you operating a juke box route at the present time? A. No.

(Testimony of John Collins.)

Q. You make no collections on a juke box route at all?

A. I have gone around with fellows; I know a lot of juke box operators.

Q. The question is—are you making any collections? A. No. [15]

Q. Are you getting any percentage or anything of that kind out of it?

A. No percentage interest or value or anything, no.

Q. Who are the fellows you go out with?

A. M. B. Connor; I have gone out with my brother; I could name 50 or 100 I am familiar with.

Q. (By The Referee): What is your present business or occupation?

A. Well, last December I had a back injury, and I was laid up—I had a disk removed in my back this past June, 1955; and after getting away from the hospital, they told me I would not be able to go to work for several months; and I am just now getting close to being able to go to work.

Q. Do you now have any business? A. No.

Q. Are you now employed?

A. I am not employed, but I expect to be soon.

Q. Do you have any source of income?

A. Well, yes; I get \$35 a week from some place—from an insurance—disability.

Q. Do you have any other source of income?

A. Yes; there is another one that pays me insurance when I am out of work. One pays me \$25; and another pays me \$20.

(Testimony of John Collins.)

Q. Have you any other?

A. Not that I know of.

Q. Has any member of your family any source of income? A. Those I just told about? [16]

Q. Now. How many children do you have?

A. I have three.

Q. Are they working?

A. My oldest one just quit to go back to school. He was working. He is an apprentice plumber.

Q. The others are younger?

A. I got a daughter; she does a little baby-sitting, but she keeps the money for herself.

Q. Is your wife employed? A. No.

The Referee: All right; go ahead.

Q. (By Mr. Tobin): Are you engaged in money-lending?

A. Not at this time. I have loaned a little money.

Q. Approximately how much do you have out on loans at the present time?

A. That would be an awful hard question to answer because I would have to think of the people. I would guess maybe \$2000.

Q. Do you have notes from them?

A. Well, no; I will tell you—you don't get a note when you loan a guy ten or twenty dollars.

Q. (By The Referee): What was the largest amount of money you have loaned to any individual that has not paid you back?

A. I think that it is \$184 at the present time.

Q. Do you have any notes from anybody?

(Testimony of John Collins.)

A. I don't believe so—no, sir.

Q. Do you have any security for any of these loans?

A. Well, like on that one I was referring to—\$100 or whatever it was—I just wrote on the check when I gave him the money “personal loan.”

Q. Have you got any mortgage or stocks?

A. No.

Q. No securities? A. No, sir.

The Referee: All right; go ahead.

Q. (By Mr. Tobin): Do you have a license to loan money to act as a money-lender?

A. I don't do it as a business—if a guy wants to borrow.

Q. Just as a matter of accommodation?

A. That's right; just like I would go to somebody and ask for \$5 or \$10.

Q. When was the last time you made a loan?

A. It has been a long time; many months ago.

Q. (By The Referee): Before you quit the business down there?

A. I would say it was before.

Q. (By Mr. Tobin): To sum the whole thing up—the only property that you have is the liquor that is in your garage; your interest in the liquor license, whatever it may be; and the interest in your family home back in New York, Niagara Falls, whatever that may be—is that [18] right?

A. Well, I don't know. You talk about interest I have in the liquor license. It just depends on whether there is an interest there. The State Board

(Testimony of John Collins.)

says it is a privilege. Some people would say it is an asset. I consider it somewhat as a liability. It costs a dollar a day to keep it.

Q. Have you parted with it?

A. No; I have to the State board; it is not transferred yet.

Q. (By The Referee): In whose name was that license issued? A. John A. Collins.

A. Any other name? A. No.

Q. Did you pay the annual beverage or license fee on that license for 1955? A. Yes, sir.

Q. When did you pay that?

A. Well, I think around about the first of the year.

The Referee: Go ahead.

Q. (By Mr. Tobin): And you executed a transfer of that license?

A. With intent to transfer, yes.

Q. Last August—last month?

A. Yes; last month.

Q. Do you contend that Mr. Lefringhouse has an interest in that license or that it is your own?

A. I figured it is best to let the judge decide it.

Q. What is your contention—that it is yours?

A. I did not give it much thought. It was in my name—I suppose I would have control of it, yes.

Q. Now, at the time that you executed the transfer to the State Liquor Control Board, you were owing your creditors, were you?

The Referee: I am sorry. I am not going to let you go into that. I am not entirely satisfied

(Testimony of John Collins.)

you can use 21a in lieu of a deposition.

Mr. Tobin: I think your Honor is right.

Q. Outside of this car, this liquor, your interest in the fixtures, and the possibility of an interest in the real property in Niagara Falls, New York, is that all the property that you have, other than what you mentioned here in Los Angeles?

A. That is all I can think of at the moment.

Q. Have you any bank account here?

A. There might be one in the Bank of America. If there is there isn't much of anything in it.

Q. That is where? A. Whittier.

Q. On Philadelphia?

A. The other one is located at Broadway and Washington.

Q. In Whittier?

A. Yes. I thought it might be at Rivera. [20]

Mr. Tobin: I think that is all.

The Referee: All right. That is all, Mr. Collins.
(Witness excused.)

The Referee: That is all for today.

[Endorsed]: Filed Sept. 13, 1955. [21]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

November 4, 1955

Appearances: For Receiver: Craig, Weller & Laugharn, by Thomas S. Tobin. For John Collins: Grainger, Carver & Grainger, by Adele O. Carver, Patricia J. Hofstetter. [1]

W. J. RYAN

a witness, being first duly sworn, testified as follows:

Examination

Q. (By Mr. Tobin): What is your occupation?

A. I am credit manager and office manager of Acme Distributing Company of Pasadena.

Q. One of the petitioning creditors here?

A. Yes.

Q. Do you know the alleged bankrupt, John Collins?

A. No, I don't, that is, I have not met him personally. I have talked to him over the phone.

Q. Did your company have any dealings with him within the last two years? A. Yes.

Q. At what address?

A. I would have to get it—it was at 13113 San Antonio Street, Norwalk.

Q. Is that a bar? A. Yes.

Q. Between what dates did your company have dealings with Mr. Collins?

A. Our first charge to him was on the 14th of May, 1954, and the last one on December 16, 1954.

Q. What was that? [2]

A. It was for whisky, spirits, some of the merchandise we handle. We are wholesale liquor dealers.

Q. Has that bill been paid in its entirety?

A. No. There is still one open invoice, December 16th, a charge of \$265.69. Then we have a returned check—the last check \$151.89 was returned

(Testimony of W. J. Ryan.)

against this account. I believe the total was \$410.00 or \$420.00, or some such figure.

Q. What is the balance due?

A. The total, these two, \$417.58.

Q. Your company is a California corporation?

A. That's right.

Mr. Tobin: You may cross-examine.

Cross Examination

Q. (By Mrs. Carver): Do you have the original purchase orders?

A. I do not have the original purchase orders. I have duplicate copies.

Q. What is the practice with your company? Does the customer sign an order or what do you have?

A. He doesn't sign an order, no. Orders are either telephoned in or given to a salesman; and when delivery is made an invoice must accompany the merchandise, which the customer signs.

Q. Do you have your delivery slips with you?

A. Yes, I do. [3]

Q. Mr. Ryan, would these indicate that these deliveries were made to 13113 San Antonio Street, Norwalk? A. Yes.

Q. The signature, would that indicate the parties who sign for the receipt of those articles?

A. Yes.

Q. You would not be able at present to say whether or not these people were connected with John A. Collins?

(Testimony of W. J. Ryan.)

A. I couldn't say, except in this way—that the merchandise was delivered to this address, and the people representing Mr. Collins obviously signed for it at that address.

Q. You would not know the parties themselves?

A. No, I had nothing to do with the deliveries.

Mrs. Carver: That is all.

Redirect Examination

Q. (By Mr. Tobin): Did Mr. Collins ever dispute this balance? A. No, he didn't.

Q. Did he ever acknowledge he owed it?

A. I have a notation on my ledger card of a telephone call which Mr. Collins made to me on the 2nd of January, this year, 1955. He asked me, first, what the balance was, which I told him; and he said, then, that he was having a little dispute with Mr. Lefringhouse [4] over their business, and he said the account would be taken care of as soon as the matter was straightened out, and that an attorney would be writing us about it.

Mr. Tobin: That is all.

Mrs. Carver: That is all.

(Witness excused.)

CHARLES A. WRIGHT

a witness, being first sworn, testified as follows:

Examination

Q. (By Mr. Tobin): What is your occupation?

A. Credit Manager and Office Manager of the California Beverage and Supply Company.

(Testimony of Charles A. Wright.)

Q. Is that a California corporation?

A. It is.

Q. Has your company had any dealings during the past four years with the alleged bankrupt, John Collins?

A. We have.

Q. At what address?

A. 13113 San Antonio Drive, Norwalk.

Q. What kind of business is that?

A. A cocktail bar.

Q. What was the nature of the dealing you had [5] with the alleged bankrupt?

A. Various orders for distilled spirits.

Q. Between what dates?

A. Between the date of June 5, 1953, and November 5, 1954.

Q. What was the total amount, in value, of merchandise sold to him during that period of time?

A. I have not got the total of the charge.

Q. Could you tell the balance?

A. The balance is \$955.16.

Q. Has any portion of the balance been paid?

A. No.

Q. Is it on open account?

A. It is.

Q. Did you send any bills to Mr. Collins for that merchandise?

A. Yes.

Q. And has he ever disputed the bill until this particular bankruptcy was filed?

A. No.

Q. Did he ever acknowledge that he owed it to you?

A. Yes, he has.

Q. In what way, and when?

A. I will qualify that slightly—he acknowledged

(Testimony of Charles A. Wright.)

he owed—the biggest part of it, I would say, [6] not any definite amount, but with any settlement or agreement he would look out for us.

Mr. Tobin: You may cross examine.

Cross Examination

Q. (By Mrs. Carver): Do your records show who ordered the merchandise?

A. No, our system is, the salesman takes the orders or they are phoned in directly from the customers, and the salesman writes up the order, but the customer does not sign any order.

Q. Do you have the delivery slips with you?

A. I have.

Q. Would you know or recollect the various parties who signed for the receipt of this merchandise?

A. Not personally. I would know some of the parties who have signed, for instance, this is Lefringhouse, and Norine Lefringhouse, the wife of Stanley Lefringhouse, who was manager of the bar, and some others. There is one that looks like Mr. Collins' own signature. I am not positive, because I am not a writing expert—they sign by John Collins and Lefringhouse, I believe—I am not sure about the writing. I could not swear to it.

Mrs. Carver: That is all.

Redirect Examination [7]

Q. (By Mr. Tobin): Under what name do you carry this account?

A. John A. Collins.

(Testimony of Charles A. Wright.)

The Referee: Does the name Stan's Stage Coach Stop appear anywhere on your account?

A. No.

The Referee: Any other questions?

(There being no further questions, the witness was excused.)

J. WALTER PHELPS

a witness, being first duly sworn, testified as follows:

Examination

Q. (By Mr. Tobin): What is your occupation?

A. Credit Manager of Young's Market Company, Los Angeles Division.

Q. Is Young's Market a California corporation?

A. Yes.

Q. Located and doing business in Los Angeles?

A. That is correct.

Q. What is the nature of its business?

A. Wholesale liquor, the division I am representing.

Q. Do you know Mr. John Collins?

A. I do not. [8]

Q. Did Young's Market Company have any business dealings with one John Collins during the four years last past?

A. During those years, yes, sir.

Q. What did those business dealings consist of?

A. The sale of alcoholic merchandise.

Q. To what address?

A. 13113 San Antonio, Norwalk, California.

(Testimony of J. Walter Phelps.)

Q. And was there any fictitious firm name or style used in connection with it?

A. On one there is Stag's Stage Coach Stop; and on the other it is Stan's.

Q. Was that an open account? A. Yes.

Q. Is there any balance due on it?

A. Yes. We have two invoices, totaling \$242.70.

Q. Remaining due, owing and unpaid?

A. Yes.

Q. Have you billed Mr. Collins at that address for that balance?

A. Yes; the invoices were delivered with the merchandise—that is, the extent of the billing. However, semi-monthly statements have been mailed to that address.

Q. Has there ever been any denial until the [9] petition in bankruptcy was filed by three petitioning creditors, including your company?

A. There has been no denial that I know of.

Mr. Tobin: You may cross-examine.

The Referee: What are the dates of the unpaid invoices?

A. We have one August 18th, 1953, in the amount of \$28.86; the second, October 5, 1953, \$213.84.

Cross Examination

Q. (By Mrs. Carver): Do your invoices show who received the merchandise?

A. I have delivery copy signatures, yes, ma'am.

Q. Would you know whether or not these pur-

(Testimony of J. Walter Phelps.)

chases were connected with the Collins' business?

A. I have no knowledge whether they were or are or ever have been.

Mrs. Carver: That is all.

Q. (By the Referee): Are these the only two transactions you had with this man?

A. No; there were others, but they have been liquidated.

Q. Were they later or prior?

A. The liquidated transactions were prior.

Q. But you do not have anything now which would indicate who paid the prior obligations? [10]

A. I do not have any evidence here. We might be able to find it through our invoice records.

Q. What would they be?

A. Usually we keep an exact transcript of every check going through our organization; and we would have to go back and find out when a particular check might have been given to us for one of the previously paid invoices, and then trace it down.

Q. What would that show?

A. It would show the party who signed the check.

The Referee: Any other questions?

(There were no further questions and the witness was excused.)

RALPH MEYER

a witness, being first duly sworn, testified as follows:

Examination

Q. (By Mr. Tobin): What is your occupation?

A. Receiver, Trustee, Assignee, handling a lot of assets in the liquidating field.

Q. Have you handled the transfer of any liquor licenses in the last year? A. Yes, I have.

Q. Are you familiar with the value of liquor licenses, transferring from the present holder of a [11] value to a transferee? A. Yes, I am.

Q. Are you familiar with the value of liquor licenses, or were you, on or about August 4, 1955?

A. Yes.

Q. In the City of Los Angeles? A. Yes.

Q. And what would you say would be the value of an "on sale" liquor license at or about that period of time?

A. Between \$4,500.00 and \$5,000.00.

Mr. Tobin: You may cross-examine.

Cross Examination

Q. (By Mrs. Carver): Mr. Meyer, are you familiar with Rule 65 of the Alcoholic Beverage Control Act? A. Yes, I am.

Q. Could you explain to us just what the rule is?

A. That pertains to the surrendering of a license, is that the one?

Q. Yes.

A. The rule provides that where a business is

(Testimony of Ralph Meyer.)

discontinued for more than ten days, the license must be surrendered to the State Board of Equalization until an application is made to transfer the license to a new licensee. In other words, if a business is discontinued [12] for more than ten days, you have to surrender your license.

Q. Now, is it your understanding that at the expiration of the six months' period of time that then the license is lost?

A. Under the new rule that has been put into force and effect, you can only surrender the license for a six-months' period.

Q. Would you say with that in mind that within a period of from ten days to two weeks before the license would become inactive that a license would have a value of \$4,500.00?

A. Yes, it would, for this particular reason—you have until the expiration of the six months in order to effect a transfer, in other words, the six months' period expires; but it does not expire if you make a transfer within that particular period.

Q. If a transfer was not made or no steps taken to transfer the license, and if it loses its effect in ten days, what would you say would be the value of the license?

A. That is rather difficult, because there would be negligence on the part of the person for not trying to sell during the ten-day period, but it would still have value, because you still have ten days to make an application for transfer. [13]

Q. Would you say it would have as much value

(Testimony of Ralph Meyer.)

during that ten-day period as it might have with more time?

A. I cannot see any reason why it would affect the value of the license, for this particular reason—the license is good until the expiration of the ten days; and if you make an application on the ninth day, the license would still be good, and you would be able to get the market value.

Q. But you could not say whether or not it would have that market value?

The Referee: The answer is that it would have the same value up to the expiration of the six months' period. Is that correct?

A. That is correct.

Mrs. Carver: That is all.

(There being no further questions, the witness was excused.)

Mr. Tobin: At this time we would like to offer in evidence a certified copy of Notice of Intention to Transfer of Liquor License from John A. Collins to Fred de Carlo.

The Referee: It will be Creditors' Exhibit No. 1. [14]

ROSCOE Z. MATTHEWS

a witness, having been first duly sworn, testified as follows:

Examination

Q. (By Mr. Tobin): What is your occupation?

A. I am the liaison officer between the Depart-

(Testimony of Roscoe Z. Matthews.)

ment of Alcoholic Beverage Control and the Board of Equalization.

Q. Where is your office?

A. 357 South Hill Street.

Q. Do you have with you the records of the Alcoholic Beverage Control pertaining to an application for transfer of liquor license from John Collins to Fred de Carlo? A. I do.

Q. Will you state to the Court what records you have brought with you?

A. I brought the complete file of Collins and also the file of de Carlo.

Q. Now, I will ask you whether or not you have in your records any certified copy or copies of Notice of Intention to Transfer Liquor License from John Collins to Fred de Carlo?

A. I don't have one with me presently. It goes directly to Sacramento.

Q. Do you have with you the application for a transfer? [15] A. I do.

Q. And do you have any other additional copies of it? A. No.

Q. May I ask that you let the Court examine it. The Referee: Has counsel seen it?

Mrs. Carver: No, I haven't, your Honor.

A. This is the application. This shows whether it was transferred from Collins to de Carlo; this is merely a fingerprint affidavit.

Q. Calling your attention to the back of the application by transferer, which reads as follows: "The undersigned hereby makes application to sur-

(Testimony of Roscoe Z. Matthews.)

render all interest in the attached license described below." That was on license of "on-sale," general "P," file No. 13,276; license No. P-9355-B, double transfer, "P." Location—13113 San Antonio Drive, Norwalk, out, L. A. County, Cal. To transfer the same to the applicant and/or location indicated on the reverse side of this application, if such transfer is approved by the Director. It is signed, "John A. Collins." I will ask you to state whether or not there were any further steps necessary insofar as John A. Collins is concerned to effectuate a transfer of that license, so far as he is concerned?

A. Not so far as Collins is concerned. [16]

Q. What steps would have to be taken to vest a title to that license in the name of the transferee?

A. It would depend on the rules of the Department of Alcoholic Beverages Control, such as, whether or not Collins' record were such that they would allow the transfer.

Q. Would there be anything more for Collins to do?

A. Not for Collins.

Mr. Tobin: May I ask the Court to examine this?

The Referee: The application is a printed form, headed, "Application for Transfer of Alcoholic Beverage License." It contains the information read by counsel for the petitioning creditors. It appears to be dated August 5, 1955. The effective date is given as 7-1-55." It appears to have been verified on August 4, 1955. It contains the notation—"Sacramento under Rule 65." The application for trans-

(Testimony of Roscoe Z. Matthews.)

fer is signed, "Fred de Carlo." The application by transferer is signed "John A. Collins." What is the present state of this transaction, Mr. Matthews?

A. Well, sir, at the present time it is being held in Sacramento, and the only thing I can tell you is what I have here. There is a report, on what we call the license report, it says that issuance under Section 24,044, license to be held pending certified report, confirming compliance with a bona fide restaurant. In [17] other words, it is State law that a "P" license can only be used for a bona fide restaurant. So far as I know, that has not been complied with. Until such time the Department will not issue a license. It will remain in the transferer's name, and if it is surrendered, why, if it is not used within six months, it will automatically die; but since there was a transfer already made, if he complies and puts in a bona fide restaurant, there is a possibility it will be transferred; but I cannot tell you exactly what the Board will do at Sacramento. I don't know.

The Referee: Are there any other questions?

Mr. Tobin: That is all.

Cross Examination

Q. (By Mrs. Carver): Mr. Matthews, could Mr. Collins at any time before the actual transfer and approval of the transfer of that license by the Alcoholic Beverage Control Board have withdrawn his application?

A. From the date that was notarized and went

(Testimony of Roscoe Z. Matthews.)

through the cashier's window, so far as he was concerned, he had given permission for the transfer, that is, of his own action. It may revert back to him, but it could not be because he decided that he wanted to rescind.

Q. At any time before the transfer could any [18] interested party protest the transfer of that license? A. That is true, it can be.

Q. Anybody in interest can do that?

A. That's right.

Q. Do you have in those files an application signed by Mr. Collins in January, 1954, as to the transfer of the license to a Mr. Lichenfeld?

A. The application would have been in Lichenfeld's file.

Mr. Tobin: That would be immaterial.

The Referee: Objection sustained.

Mrs. Carver: Your Honor, the purpose of this is to show the procedure that was handled by Mr. Collins withdrawing his application, in similar circumstances to this, and the Board having cancelled it.

The Referee: That is a question of law, Mrs. Carver. The witness has given us his impression of existing law, that once the application, or transfer, is presented, duly signed by the transferer and the transferee, there can be no withdrawal. However, it is the Court's responsibility to determine the law in that kind of a situation, even if the Board permitted something to be done on a previous occasion, that would not permit them, or require them, to do

(Testimony of Roscoe Z. Matthews.)

something of a similar nature on a subsequent date.

(There being no further questions, the witness was excused.) [19]

JOHN A. COLLINS

a witness, being first duly sworn, testified as follows:

Examination

Q. (By Mr. Tobin): Were you ever in business? A. Yes, sir.

Q. Where? A. At what time?

The Referee: Let us get down to the point. What about this business at Norwalk? Did you ever own it?

A. I did.

Q. Did you own the liquor license there?

A. I did.

Q. And did you on August 4, 1955, make an application to the Alcoholic Beverage Control Board for a surrender value of an interest in that license, a transfer to Fred de Carlo?

A. I made an application of transfer to Fred de Carlo, yes.

Q. What did you do with the license?

A. I didn't do anything.

The Referee: I think it is stipulated that the license has been on deposit with the Alcoholic Beverage Control Board under Rule 65, is that correct?

Mrs. Carver: Yes.

Q. (By Mr. Tobin): What did Mr. de Carlo pay you for that license? [20]

(Testimony of John A. Collins.)

A. Nothing.

Q. What is it worth?

A. It just depends on how you look at it. I don't know what it is worth. Some people consider it an asset, some people consider it a liability, other people consider it a privilege.

Q. What do you consider it?

A. I would say, for one, it is a privilege.

Q. And worth how much on August 4, 1955?

A. We don't consider it in money, do we?

The Referee: I am sorry, gentlemen, you are getting us nowhere. You have evidence in the record that the license was worth from \$4,500.00 to \$5,000.00.

Q. (By Mr. Tobin): Now, in addition to that liquor license, as of August 4, 1955, what other property did you own?

A. On that same date?

Q. Yes.

A. My attorney has got a list of it.

Q. Your counsel has handed me what purports to be a statement of assets and liabilities, listing real property, lot 19, tract 16,868, valued at \$15,000.00. Is that your residence?

A. That is true.

Q. In whose name does title to that property stand? [21]

A. I believe it is my wife's.

Q. And cash in possession of yourself, \$1,500.00. What date did you have \$1,500.00 in cash, in your possession?

(Testimony of John A. Collins.)

A. I would say I had approximately that amount on August 4th.

Q. What is this statement, as of——

A. August 4th, I believe——

Mrs. Carver: Your Honor, I object. He is trying to prove insolvency at the date of the alleged transfer. I don't believe it is an element.

The Referee: What is it?

Mrs. Carver: This is his position, that at the date of the filing of involuntary petition.

Mr. Tobin: All right, we will get the date of the filing of the involuntary petition.

The Referee: August 22nd, 1955.

Q. (By Mr. Tobin): On August 22, 1955, this real property stood in your wife's name, is that right? A. Yes.

Q. Did you have \$1,500.00 in your possession on August 22, 1955?

A. I would say "yes," approximately.

Q. William A. Wylie was appointed the Receiver on or about that date?

A. I believe there was a receiver appointed——

Q. You were called on by the Receiver, and you told him your assets, did you not?

A. Not that I know of.

Q. Did you tell him, the Receiver, you had \$1,500.00 in your personal possession at that time?

A. He didn't ask me.

Q. I am asking if you told him that.

A. I never seen Mr. Wylie; I don't remember of seeing him.

(Testimony of John A. Collins.)

Q. Did one of Mr. Wylie's representatives call on you? A. Yes, about three days ago.

Q. Not before? A. No.

Q. You had a stock of whisky stored in the garage, valued at \$400.00? A. Approximately.

Q. As of the date at the filing of the petition?

A. I would say approximately, yes.

Q. Was that whisky ever picked up by the Receiver? A. No.

Q. Or anyone representing him? A. No.

Q. You put under "furniture" the cost, \$4,000.00. [23] That was what it cost you?

A. That is approximately what I paid for it.

Q. How long ago did you buy it?

A. I bought it since 1952, 1953, or 1954,—I would say those three years, during those years.

Q. What was the furniture worth on the 22nd of August, 1955?

A. It was worth as much as I paid for it, if I had to replace it.

Q. It is still worth \$4,000.00?

A. I presume so.

Q. This unliquidated claim for \$3,500.00, what is the nature of that unliquidated claim?

A. It is a compensation deal. I was injured here last December; I was in the hospital in June for a disk operation; and the compensation people wanted to settle with me.

Q. Did you accept the settlement? A. No.

Q. The matter is still unliquidated?

A. Yes, still pending. They just made offers.

(Testimony of John A. Collins.)'

Q. Cash surrender value of life insurance policy, \$17,000.00, what is the company?

A. Various companies, the Metropolitan Life, Columbia National, United States Government Insurance.

Q. How much of the cash surrender value for [24] each one of the policies?

A. The total, roughly, around \$1,700.00.

Mrs. Carver: You have the policies right there.

Q. (By Mr. Tobin): You list 1000 phonograph records. Are records a dollar apiece?

A. I believe about 98c, some \$1.15; some \$1.25.

Q. A 1952 Ford car. A. Yes.

Q. \$600.00. In whose name does that stand?

A. I don't know whether in my wife's or mine; I really couldn't tell you.

Q. And you have got a claim for damages in connection with an injury to your son?

A. Yes.

Q. That is for your son's injuries?

A. That is correct.

Q. And that is unliquidated, also?

A. I would say so.

Q. And you have tools, \$1,000.00?

A. Approximately.

Q. What kind of tools?

A. Hand tools—wrenches, saws, power tools, an electric saw, a metal cutter, and various things like that that I used in my trade.

Q. What is your trade? [25]

A. I am a steamfitter.

(Testimony of John A. Collins.)

Q. And you claim an interest in money held in escrow, in the amount of \$3,000.00. Where is that escrow?

A. It is at the Vista Escrow Company; it is on Atlantic Avenue, but I think they have moved their office to Wilshire Boulevard.

Q. What claim do you lay to that?

A. I sold the bar to Harry Litchenfeld, in, approximately, January, 1954; and it was under the condition that in the event—Litchenfeld was going to take immediate possession—in the event he had any violation with the State Board of Equalization, he was either to come up with the full amount of money or surrender the \$3,000.00, and return the place.

Q. Did you get the \$3,000.00?

A. From all I know it is supposed to be down in the escrow.

Q. Did you ever lay any claim to it?

A. Yes, I did.

Q. What did you do to get hold of this \$3,000.00?

A. I didn't go down yet.

Q. You have had creditors after you, have you not, suing you for claims that you owe?

A. No; they are suing me under the claim that I owe.

Q. You have had a number of judgments taken [26] against you in the Municipal Court, have you not?

A. Not that I know of. There was one, I believe.

(Testimony of John A. Collins.)

Q. Now, you had a suit against you in the Municipal Court, Los Angeles Judicial District, Case No. 273,742, entitled Interstate Credit Service, Inc. vs. Collins, in which a judgment was rendered by Judge Newell Cairns on September 7, 1955, in the sum of \$229.64, didn't you? A. That is true.

Q. Did you pay that judgment?

A. It has been since the bankruptcy filed.

Q. You owed that bill at the time you claimed you had this \$3,000.00 coming out of escrow, and this \$1,500.00 cash in your possession, did you not? You owed this bill? A. They claimed I owed it.

The Referee: It is argumentative. Proceed. He admits the judgment was entered.

Q. (By Mr. Tobin): You had another judgment rendered against you in Case No. 271,363, in the Municipal Court, in favor of the Interstate Credit Service, Inc., in the sum of \$182.96, on September 7, 1955, by Judge Cairns?

A. It is the same one, yes, sir.

Q. And you had another judgment rendered [27] against you in the Municipal Court, being Case No. 264,333, in the sum of \$351.43, is that right?

A. I believe they were all combined into one case.

Q. What steps did you take to pay those bills before they sued and reduced the claim to judgment?

Mrs. Carver: I don't believe that has anything to do in this case.

Mr. Tobin: It is a question of insolvency.

(Testimony of John A. Collins.)

The Referee: Objection sustained.

(Discussion.)

Q. (By Mr. Tobin): These bar fixtures in Norwalk you list at \$7,000.00. Were they encumbered?

A. You mean is there any indebtedness against them?

Q. Yes. A. There could be.

Q. How much?

A. I would not know that.

Q. Approximately how much?

A. I couldn't even take a guess at it.

Q. You don't know?

A. Well, I understand that Mr. Lefringhouse put a chattel mortgage against them, and I don't know whether he actually paid or not.

Q. You put them in as an asset? [28]

A. Yes. I feel they are of the value of \$7,000.00.

Q. And you don't know what there is against them?

A. There is nothing against them that I can recall, right at the moment.

Q. (By The Referee): Let us clear that up—you don't pretend to own those fixtures at this time, do you? Are they not the ones you sold?

A. You mean to Lichenfeld?

Q. Yes. A. That escrow never went through.

Q. But you claim as an asset \$3,000.00 of money that is in the escrow? A. Yes.

Q. Either you got the \$3,000.00 or you got the fixtures back, is that not right?

A. No, the agreement was with Lichenfeld that

(Testimony of John A. Collins.)

he was to surrender the \$3,000.00 and give it back if he put the license into jeopardy; and it did not go through.

Q. So that if he does not go through with the deal you will get the \$3,000.00, is that right?

A. I get the \$3,000.00 and fixtures back.

Q. Well, assuming he has put a mortgage on the fixtures? [29]

A. You have two mortgages—one to Litchenfeld and one to Lefringhouse.

Q. What is the distinction?

A. Lefringhouse was a manager of mine and Litchenfeld was the man that was going to buy the bar from me.

Q. Are you saying that the manager might put a mortgage on it?

A. That is correct. That is where this argument has been, about these whisky bills. Litchenfeld, the fellow that was going to buy the bar on January 18, 1954, the whisky bills that were paid was purchased from this company—Harry Litchenfeld buys part of the whisky when he took it over. I gave to Stan Lefringhouse approximately between \$1,500.00 and \$1,800.00, in that area, with no accounting of the \$1,500.00 to \$1,800.00, that is, the whisky, but all this disputing has been as to whether Lefringhouse had the right to sell the whisky and take it and not produce. What he did with the money or why he did not pay for the whisky is what the deal was there.

(Testimony of John A. Collins.)

Q. What was the name of this man you sold to?

A. Litchenfeld.

Q. You sold Litchenfeld? A. That is true.

Q. That is the deal that was in the escrow? [30]

A. It was.

Q. Isn't it there now?

A. I guess it is still pending, the money is supposed to be there; it is still open, yes.

Q. Did he go into possession?

A. He did, as of January 18th or 20th, 1954.

Q. Have you retained possession since that time?

A. That is true. May 11, 1954, I took it back.

Q. You took it back? A. Yes.

Q. You took it back on May 11, 1954. Now, what is the name of that manager?

A. Stanley Lefringhouse. He is present in the courtroom.

Q. Now, you owned the place after May 11, 1954?

A. Well, at that time Stan and I were going to become partners.

Q. Who is "Stan?"

A. Stanley Lefringhouse—he and I were going to become partners, and we were going to form a corporation, and which we did. We proceeded to do that as of some time in July, we started the corporation, but he never wanted to finish it; and, so, he comes up and tells me, "What are we? Are we partners?" Is it a partnership? Does he own it? [31]

Q. You took it back from Litchenfeld?

(Testimony of John A. Collins.)

A. Yes.

Q. Did you actively manage the business yourself, then? A. May 11th?

Q. Yea. A. No.

Q. Have you at any time actively managed this business since May 11, 1954? A. No.

Q. You have not? A. No—Lefringhouse.

Q. Now, was there a liquor license in use in those premises? A. Yes, sir.

Q. And who was the holder of that license?

A. John Collins—myself.

Q. Is that the same license that you allowed to be transferred to de Carlo? A. Yes.

Q. Is that the same license which you impounded with the Alcoholic Beverage Control?

A. That is true.

Q. How long did Lefringhouse operate the business after May 11, 1954?

A. Until I closed it up. [32]

Q. When did you close it?

A. December, 1954.

Q. Has the business been operated in that location since that time?

A. No, not to my knowledge.

Q. Well, let us go back a little bit again. You owned the business when you arranged to sell it to Litchenfeld, is that correct? A. Yes, sir.

Q. Litchenfeld did not complete the bargain and you took it back, is that right?

A. That is true.

Q. Did you have any papers of and kind show-

(Testimony of John A. Collins.)

ing that you transferred that business to a corporation or to a partnership, any papers?

A. If there are any papers in existence, they would be in Mr. Snyder's office—he is an attorney in Los Angeles that formed the corporation. He told me the last time I saw him that everything has been completed in the corporation except transferring the assets.

Q. Do you know whether there was ever any transfer of the assets?

A. I don't believe there was.

Q. Now, was there a liquor license involved in the deal with Litchenfeld? A. Yes. [33]

Q. Is that the same license we are still talking about? A. That is true.

Q. Was that license ever transferred to Litchenfeld? A. Yes.

Q. That is the one you withdrew?

A. That's right.

Q. So that there never was a transfer?

A. No.

Q. Well, do you want the Court to understand that someone other than yourself could be operating this business after May 11, 1954, and who used this license in doing so?

A. Well, you mean insofar as Lefringhouse is concerned?

Q. No. Let me make my question clear. The license was still in your name on and after May 11, 1954, and remained in your name until you took steps to transfer it to de Carlo and in the meantime

(Testimony of John A. Collins.)

you deposited the license with the Alcoholic Beverage Control Board? A. Correct.

Q. Therefore, during the period from May 11, 1954, to December, 1954, or thereabouts, a liquor dispensing business was in operation at this address, and the only license that you had was the license which was issued in [34] your name, is that correct?

A. Yes, that is true, "on sale." There is a liquor store in the same building.

Q. You had nothing to do with that? A. No.

The Referee: Well, the fixtures appear to me to be the property of Mr. Collins. Now, whether there was any encumbrance on the fixtures, that, of course, is something we don't know about.

Q. (By Mr. Tobin): Do you know whether they are encumbered?

The Referee: He has already answered the question—he does not know whether Mr. Lefringhouse put a mortgage on or not.

Q. (By Mr. Tobin): Showing you this list of liabilities that your counsel handed me, what are the addresses of these people that you list as creditors? A. The address of each person?

The Referee: What is the purpose of the question?

Mr. Tobin: I will withdraw it. Taking up the first item, encumbrance on real property, \$6,800.00, did you and your wife both sign the promissory note on the encumbrance on the real property?

A. I believe so.

(Testimony of John A. Collins.)

Q. And the encumbrance on your car, did both sign it? [35] A. I believe so.

Q. Now, the sales tax of \$676.50, that was incurred in the operation of this business that you have been talking about? A. That is correct.

The Referee: What is the amount of the sales tax?

Mr. Tobin: \$676.50.

A. That is an estimate, not an exact figure.

Q. Then, United States taxes are approximately \$2,000.00. They were incurred in connection with that business? A. They claim that.

Q. The Norwalk Lumber Company, \$105.00, is that correct?

A. I believe that is what the bill reads.

Q. "Brew 102, \$61.01. Was that incurred in connection with that business?

A. That is what they told me.

Q. And Rheingold, \$33.54, was that incurred in that business? A. The same.

Q. Now, Von Ronkle, \$351.43, was that incurred in that business? A. The same.

Q. Duffield, \$229.64, was that incurred in that business? [36] A. The same.

Q. H & Z Distributing Company, \$182.96.

A. The same.

Q. Young's Market, \$242.70? A. The same.

Q. You deny under oath that you owed Young's Market any money at all?

A. I said that is what they claim.

Q. Do you owe them or don't you?

(Testimony of John A. Collins.)

A. There are disputed bills; but when I talked to my attorney, Mrs. Carver, she said, "What is the worst possible picture of indebtedness that they could possibly put forward, whether you owe them, or whether you saying you owe them or you don't owe them?" Do you understand what I mean? That is what I said—I said that is what they claim.

Q. You claim you don't owe Young's Market anything?

A. That is correct.

Q. What about the Acme, you have listed them here, \$417.00.

A. The same answer.

Q. California Beverage, \$955.16.

The Referee: The same answer.

A. I think the Judge answered that one.

Mr. Tobin: It might be well to offer this list of [37] liabilities in evidence. It would be more convenient than going through the whole list.

The Referee: All right. Petitioning Creditors' No. 2.

(At this point a recess was taken after which the following proceedings were had:)

Q. (By Mr. Tobin): Mr. Collins, when did you acquire the fixtures in this liquor business?

A. Which part of them, or all of them?

Q. The fixtures you claim in this list of assets, \$17,000.00, I believe it is, when did you acquire them?

A. In 1953 and 1954, those two years.

Q. From whom did you acquire them?

(Testimony of John A. Collins.)

A. It depends as to which item you are referring to.

Q. What fixtures were there in this bar?

A. Well, there was a bar box and a cooler—that came from Perlick.

Q. All of them?

A. No, there were different items from different places.

Q. From whom did you acquire these items of fixtures? A. Some of them were made.

Q. By whom? [38]

A. We hired help to make them, such as a carpenter.

Q. Take the fixtures as a whole, from whom did you buy those fixtures, exclusive of those you had made?

A. Some from Stanley Lefringhouse.

Mr. Tobin: May I see the affidavit of this witness in connection with the application for the liquor license?

Q. Showing you an affidavit sworn to before a notary public on January 12, 1953, I will ask you if that is your signature on there, "John A. Collins"? A. I would say it is.

Q. And that affidavit was delivered to the State Board of Equalization in connection with an application for liquor license, was it not?

A. Well, yes, that is true. That is January, 1953.

Q. Now, is this statement in this affidavit true, "is buying nothing" applying for a new "P" license?

(Testimony of John A. Collins.)

A. As of January, 1953, that is true.

Q. You were buying nothing?

A. That is true.

Q. When did you buy the fixtures, then, after that?

A. I would say about April or May.

Q. Since January, 1953, were you leasing the premises? [39]

A. No—that very date?

Q. Yes.

A. I believe I was, but I wouldn't be sure of the exact month.

Q. What about the truth or correctness of this statement in this affidavit, "Applying for new 'P' license and leasing the premises furnished from present licensee, Stanley E. Lefringhouse who holds 'A' "? A. That is true.

Q. You bought the fixtures from Stanley Lefringhouse after that? A. That is true.

Q. What did you pay him for them?

A. I don't remember the exact amount.

Q. Approximately?

A. Well, I gave him a total amount, I guess, of \$3,500.00 or \$4,500.00.

Q. Is this statement true that is contained in this affidavit of application, "Are you the sole owner of this business?" Then "Not at present, will take over the business if and when a new license is issued." Is that true? A. It is very possible.

Q. Who was the other owner of the business?

A. The previous owner was Stanley Lefringhouse. He ran a beer bar in the place. [40]

(Testimony of John A. Collins.)

Mr. Tobin: Now, I am returning this affidavit to the witness Matthews.

Q. Now, you were examined in this court, under oath, on September 6, 1955. Do you recall that?

A. I do.

Q. Now, do you recall my asking you with regard to the assets that you had as follows:

“Q. (By Mr. Tobin): To sum the whole thing up—the only property that you have is the liquor that is in your garage; your interest in the liquor license, whatever it may be; and the interest in your family home back in New York, Niagara Falls, whatever that may be, is that right?

“A. Well, I don’t know. You talk about interest I have in the liquor license. It just depends on whether there is an interest there. The State Board says it is a privilege. Some people would say it is an asset. I consider it somewhat as a liability. It costs a dollar a *year* to keep it.”

Q. Did you so testify, under oath?

A. May I see it?

Q. Yes. [41] A. Correct, property——

Q. I am just asking you if you answered it that way under oath.

A. Yes, I believe I did, similar to that.

Q. Now, then, you were asked:

“Q. Outside of this car, this liquor, your interest in the fixtures, and the possibility of an interest in the real property in Niagara Falls, New York, is that all the property that you have, other than what you mentioned here in Los Angeles?

(Testimony of John A. Collins.)

“A. That is all I can think of at the moment.”

Was that question asked you and did you so testify? A. I believe I did.

Q. What was the interest in the fixtures you claimed at that time when you were examined here under 21-A of the Bankruptcy Act, on September 6, 1955?

A. The interest in the bar fixtures.

Q. What was it?

A. What was it in amount?

Q. Yes, what was the interest you claimed in those fixtures?

A. I really don't recall. It was just a thumb amount, if there was an amount given at all. [42]

The Referee: You cannot ask what he testified on that date. The rule is you have got to show him the transcript and ask him if he did so testify.

Mr. Tobin: I did. I am asking what interest he claimed.

The Referee: Then, that is in the transcript.

Q. (By Mr. Tobin): How long have you lived in Los Angeles?

A. About four years, I would say.

Q. Continuously?

A. Well, I have been away, out of the state.

Q. I mean, your residence is in Los Angeles County?

A. I have had an address in Los Angeles County, I would say, continuously for four years.

Q. You have made your home here in Los Angeles County, State of California, for the last four

(Testimony of John A. Collins.)

years, have you? A. I would say so.

Q. And all of your activities were confined to business in Los Angeles, or Los Angeles County?

A. I would say so, the general area of Los Angeles. It was not necessarily always in the County.

Q. But south of Fresno County?

A. I don't know where Fresno County is.

Q. Do you know where Fresno is? [43]

A. It is up near Bakersfield, north?

Q. It was all south of Bakersfield?

A. Yes.

Q. And north of the Mexican border?

A. Yes.

Mrs. Carver: This seems to be immaterial.

The Referee: It is all very interesting from a geographical standpoint, but it is not getting us anywhere.

Mr. Tobin: It is in respect to allegation No. 1, residence in the district, Southern District of California.

The Referee: Does that allege he is not a resident of Southern California?

Mrs. Carver: I don't believe we denied that allegation.

Mr. Tobin: I thought everything was denied except the Notice of Intention.

The Referee: He denies that he had any place of business within said period, that is all.

Mr. Tobin: Well, I want to establish residence.

The Referee: You are not relying on residence, you are relying on principal place of business.

(Testimony of John A. Collins.)'

Mr. Tobin: I am going to ask the Court for leave to amend.

The Referee: Until the amendment is here, you cannot ask. Any other questions? [44]

Mr. Tobin: That is all.

The Referee: Do you have any questions at this time?

Mrs. Carver: Not at this time.

Q. (By Mr. Tobin): One other question — do you know Harry McDonald?

A. The name does not “ring a bell.” I could possibly know him but I don’t believe I do.

Q. Do you know William D. Smith?

A. I doubt very much if I do.

Mr. Tobin: That is all.

(There being no further questions, the witness was excused.)

STANLEY E. LEFRINGHOUSE

a witness, being first duly sworn, testified as follows:

The Referee: What is your name?

A. Stanley D. Lefringhouse.

Examination

Q. (By Mr. Tobin): What is your occupation?

A. Right now, my wife and I are co-partners in a liquor store, we own a liquor store together.

Q. Do you know the bankrupt, John Collins?

A. I do.

Q. Did you ever have any personal property of

(Testimony of Stanley E. Lefringhouse.)

[45] any kind in the property known as 13113 San Antonio Avenue, Norwalk?

A. Any personal property?

Q. Yes. A. Yes, I did.

Q. Consisting of what?

A. All furniture and fixtures, all the decorations, chairs and tables—kitchen.

The Referee: Briefly you owned the business, is that right?

A. I owned all the furniture and fixtures, yes, and the lease.

Q. (By Mr. Tobin): Did you ever sell to this bankrupt? A. No, I did not.

Q. Did you ever manage a business at that address for this bankrupt? A. Yes, I did.

Q. Between what dates?

A. Approximately April or May, 1953, to January 18, 1954,—May 11, 1954 to December 23, 1954.

Q. Do you know Harry McDonald?

A. Yes, I do.

Q. What did he do?

A. He was a bartender.

Q. At that address? [46]

A. Yes, 13113 San Antonio.

Q. Do you know William D. Smith?

A. Yes, "Smitty," he was a bartender at 13113 San Antonio.

Q. Were they working under your direction?

A. Yes, they were working for Mr. Collins, under my direction.

Q. Now, during the time that you were manager

(Testimony of Stanley E. Lefringhouse.)

there did you have occasion to sign delivery receipts for liquor? A. Yes, I did.

Q. For the liquor?

A. That's right. Then we would put those in the register; Mr. Collins has seen the receipts many times.

Q. Who was it that took the receipts from that business?

A. They were just put in an envelope and given to a bookkeeper.

The Referee: You mean the money was put in an envelope?

A. He was asking about receipts.

The Referee: He means cash receipts.

Mr. Tobin: That is what I mean.

A. Money, cash receipts, we just try to pay all the bills. There were a lot more bills than that, [47] and most of the bills were C.O.D. plus; an order would come in for \$100.00, and there was a big bill order; and so we would pay "C.O.D. plus"; in other words, plus ten or twenty; and they would bill the other, to keep it current.

Q. Who was it took the profits?

A. There weren't any profits.

Q. Now, among the assets that Mr. Collins claims to own is a claim against you in the sum of \$2,300.00. Do you know anything about that?

A. No, I don't. For \$2,300.00?

The Referee: What is that?

Mr. Tobin: He claims holding a claim against you for \$2,300.00, as an asset.

(Testimony of Stanley E. Lefringhouse.)

A. Can Mr. Collins clear that up?

The Referee: What do you know about it?

A. I don't think—I have no recollection at all owing Mr. Collins \$2,300.00.

Q. (By Mr. Tobin): Did you owe him any sum, so far as you know?

A. No, I do not. I would like that cleared, though.

The Referee: Don't worry about it now. Go ahead.

Mr. Tobin: I think that is all so far as this witness is concerned. [48]

Examination

Q. (By the Referee): What arrangement, if any, did you make with Mr. Collins when you went there, on or about May 11, 1954? Did you have anything in writing? A. No, sir.

Q. What was the verbal arrangement?

A. Mr. Collins, from the time he bought the license in 1953, was going to buy the license for me; and I was going to pay him the sum of \$5,500.00 back, at the rate of \$150.00 a month, and mortgage my equipment and everything to cover the cost of the license. Instead, Mr. Collins put the license in his own name; and after that he said I would have to pay him \$5,500.00 cash, all in one piece before he would transfer the license. Well, it just went on; and I went down to the Board and signed up as manager, and leased the property to him, with my equipment; and up to this time

(Testimony of Stanley E. Lefringhouse.)

I tried to work a deal with him whereby I would buy the license and pay him on it. After the deal with Litchenfeld that went into escrow in January, 1954, at that time I became, in the escrow Mr. Collins signed the escrow that I owned all fixtures and equipment. It is a matter of record with the Vista Escrow; and he was to get \$5,500.00 for his license in that escrow. The reason this escrow did not go through — they served a minor and that jeopardized the license. It was not just a normal [49] transfer any more, because during that time they had possession and they served a minor.

Q. Who? A. Litchenfeld.

Q. Litchenfeld went into possession?

A. January 18, 1954, yes.

Q. Were you a party to that escrow?

A. Yes, I was.

Q. Were you selling your fixtures?

A. I was selling the lease, furniture and fixtures, and all that.

Q. You were selling the fixtures.

A. The furniture, fixtures and lease. I had the master lease. Mr. Collins was leasing from me.

Q. That deal did not go through? A. No.

Q. You still owned the fixtures?

A. I imagine so; I know so.

Q. What deal was made about May 11, 1954?

A. I was the owner and I was the manager, and I tried to make a deal, and he agreed to sell me the license. Well, that liquor scandal came up. He agreed to sell the liquor license for \$4,100.00, on

(Testimony of Stanley E. Lefringhouse.)

the basis of so much a month; I made a note, payable to his brother, so that he could discount it, and he and I signed the note. It is rather complicated. But after we signed the note again I [50] mortgaged—I was supposed to mortgage the equipment and fixtures; and Mr. Collins would not go into escrow and I would not sign, even through there was intention to mortgage, I wouldn't sign when the deal fell through, and we were right back where we started from—that Mr. Collins owned the license and I owned the fixtures and furniture, and he owned the business, and I was the manager. On December 23, 1954, Mr. Collins come in and pulled the license off the wall, and took all the liquor and took it home, and came back next day and took some more home, and it is all at his own home; I pulled down the door; and that is the situation as it stands right now.

Q. Has the place been locked up since?

A. Yes.

Q. Who owns the fixtures?

A. I do. I had to pay for most of the fixtures after it was closed. They were still mortgaged in my name, and I paid them off.

Q. Are they clear now? A. Yes.

Q. Well, you say that Mr. Collins was the owner of the business. A. Yes, sir, that's right.

Q. Did you have to have any license for this business outside of the liquor license?

A. Yes, we did. [51]

Q. What kind, for instance?

(Testimony of Stanley E. Lefringhouse.)

A. Well, there was a dancing license, food license.

Q. Wait a minute, one by one. The dancing license is, in whose name was that issued in?

A. John A. Collins.

Q. What is another license?

A. Food license to serve food.

Q. In whose name? A. John A. Collins.

Q. I am talking now about the period in 1954 after you went back. A. That's right.

Q. Any others? A. Sales tax.

Q. In whose name? A. John A. Collins.

Q. Well, now, between May 11, 1954, and December 23, 1954, did John Collins get any cash at all out of that business?

A. Yes. He and his brother—his brother is a juke box operator; and he and his brother have a juke box there together; and they took the cash three or four times—all the money from the juke box; and I did not make a record of it; but other than that he did not receive any money, because [52] there was none—the business was operated at a loss. We had all the old bills.

Q. What money did you get?

A. I did receive salary two or three times; but I have not been paid over three or four times since it started, and I have not collected rent other than the first and the last months.

Q. Between May 11, 1954, and December 23, 1954, how much money do you think you got for your own personal use out of that business?

(Testimony of Stanley E. Lefringhouse.)

A. For my own personal use?

Q. Yes. A. None.

Q. And you had to pay rent, did you not?

A. I did.

Q. How much rent did you pay?

A. Well, at first, for the master lease control of the liquor store, which I own, in front—my wife and I own it—we are both on the license.

Q. Do you still run that liquor store?

A. My wife and I run it.

Q. How much was the master lease?

A. The master lease, in 1953—

Q. In 1954.

A. Well, part of 1954 it was \$150.00; and then, in the latter part of '54, it was raised to \$350.00, about October, 1954. [53]

Q. Did John Collins ever pay you any rent?

A. Just the first and last month. Then, maybe on the books—I was to pay the rent to my landlord—to pay the amount he owed.

Q. Is the lease you have with Mr. Collins in writing? A. No lease in writing.

Q. What was the rent to be?

A. \$225.00 a month.

Q. And he actually paid you \$450.00?

A. That's right.

Q. What did you do when your own rent was raised? Did you make any arrangement with Mr. Collins?

A. At that time I had an arrangement with him—in July, 1954, he told me he would sell me

(Testimony of Stanley E. Lefringhouse.)

the license for \$4,100.00, and let me pay \$150.00 a month; and on that basis made a new lease, and then, remodeling the place and spending some money, then he would not take it to escrow; and you cannot transfer a license without going to escrow.

Q. What do you mean?

A. The master lease for the whole thing was expiring.

Q. You made a new lease with the owner of the building?

A. Yes. [54]

Q. Not by Mr. Collins?

A. That's right.

Q. How long was this sale in 1954 pending?

A. That was from January 8th to May 11th.

Q. That was the other sale, was it not, to Litchenfeld?

A. Yes.

Q. After that you and Mr. Collins worked up a deal whereby you were going to get the license?

A. Yes.

Q. How long was this pending?

A. From about July until October, I would say.

Q. During that time how much time did Mr. Collins spend in this business?

A. He came in every day.

Q. Did he work in there?

A. No. He just came around.

Q. You worked in there?

A. Yes.

Q. You hired and fired?

A. Yes.

Q. Well, you know, now, this thing is not as clear as it might be. You testified that Litchenfeld ran the business while the sale was in process?

(Testimony of Stanley E. Lefringhouse.)

A. Yes, sir.

Q. You also had a sale in process, and it could [55] probably be said you ran the business, after May 11, 1954, and you didn't turn over any money to Collins, you not only exercised all of the rights that a manager might have, but you exercised all of the rights that any owner of the business might have. Well, did you ever try to go into escrow on this 1954 deal with Collins? A. Yes.

Q. What did you do?

A. Well, I went in ahead and signed the note for the license.

Q. The note, did you get it back? A. No.

Q. It has been destroyed, or something?

A. No; his brother is suing me for that note. That is why I wanted it clear where the \$2,300.00 he and I signed. He might figure he owns half of his brother's note.

Q. Do you have any copy of that note?

A. Yes.

Q. Do you have it with you? A. No.

Q. When was it made out, if you know?

A. Approximately July, 1954.

Q. And for about how much? A. \$4,100.00.

Q. What was it for? [56]

A. To buy this liquor license in question.

Q. Was it made out to John Collins?

A. No; it was made out to Lawrence, his brother, who is in the juke box business.

Q. Where is he? A. In Los Angeles.

Q. What is his business?

(Testimony of Stanley E. Lefringhouse.)

A. He is in the juke box business.

Q. That is the brother with him in the juke box business? A. Yes.

Q. And both you and John Collins signed it?

A. The reason they wanted me and John to sign to Larry was, if they could go to the bank, Larry, being in business might discount it, with two signatures—they could get the cash immediately.

Q. You were supposed to pay it? A. Yes.

Q. And you were supposed to get the license for it? A. Yes, and mortgaged my equipment.

Q. When did Lawrence sue you?

A. February 4, 1955.

Q. Where?

A. In the Superior Court, Department 1.

Q. Had you paid anything on the note? [57]

A. Yes, I did; I gave them a couple of payments.

Q. How much?

A. I would have to look into the records, I don't recall that.

Q. Can you give me an idea? A. \$500.00.

Q. He sued you for the balance?

A. He is suing me for the whole thing.

Q. Not even giving you credit for what was paid? A. No.

Q. What did you do in the suit?

A. I answered the suit.

Q. What did you say in your answer?

A. Briefly just what I have said here, sir.

(Testimony of Stanley E. Lefringhouse.)

Q. That you didn't owe the note?

A. Yes; that there was no consideration.

Q. What is the status of the case now?

A. It comes up for trial December 30, 1955; and in the meantime his brother has put a marshal in our liquor store, my wife's and my liquor store, and taken out \$3,000.00 on this note—the note plus the marshal's fees, plus 25 percent.

Q. Plus 25 percent of what?

A. For damages—some rule—they were going to move the whole liquor store out—John and his [58] brother Larry, under some rule they have, after three days you can move it out unless you put up a cash bond; and the cash bond was \$7,300.00.

Q. You have a cash bond up?

A. Yes, \$7,300.00.

Q. You are being sued for the full face amount of the note plus interest and attorney's fees?

A. Yes; they total about \$4,600.00.

Q. Well, why have you not done something with the fixtures since John Collins came in and tore the license off the wall?

A. Well, I didn't want to go further in debt—I own the fixtures and equipment; the license cost me \$5,500.00. I went out and contacted Ralph Meyer, and if you don't have the cash they want at the time, and fees, and I don't have the \$5,500.00, and I am trying to get it together.

Q. But you are not getting any rent out of this?

A. No, I will have to pay the balance, the whole rent. The place is posted now.

(Testimony of Stanley E. Lefringhouse.)

Q. What do you mean?

A. Well, I have it posted. The corporation is going in there.

Q. What do you know about the de Carlo deal?

A. I know that de Carlo and John Collins are very good friends. At the time when we had this [59] liquor store, we put in a third party claim, when they had the marshal in there, and, so, they had to put up a justification on the sureties, and de Carlo signed.

Q. What are you talking about now?

A. I am talking about this note, that Larry Collins sued us on, and put a marshal in there, collecting the money. Well, my wife and I owned the liquor store as partners, and I was the only one that signed the note; and, so, we put up a third party claim; and de Carlo was one of the ones who put up a bond for them. They are friends and they have a juke box in this place, and games, and things like that, and de Carlo applied for a license, for a beer and wine place. They have a juke box and bowling games.

Q. Where is this juke box business of John Collins? Do they have a headquarters?

A. The juke box business is in Whittier, and they operate around that area. I think Larry testified he had one thousand records, which is rather unusual for a private owner.

Q. During the time this juke box was in your liquor store?

(Testimony of Stanley E. Lefringhouse.)

A. No, in the bar. They were taking fifty percent of the receipts.

Q. You don't have one in the liquor store?

A. No. [60]

Q. Just in the bar? A. Yes.

Q. They don't have anything to do but to put it in and they take fifty percent of the receipts?

A. Yes.

The Referee: Any further questions?

Mr. Tobin: No, your Honor.

Cross Examination

Q. (By Mrs. Carver): Mr. Lefringhouse, when did you first become acquainted with Mr. Collins?

A. With John Collins?

Q. Yes. A. 1952, I think.

Q. At that time you were operating a soft drink bar, and wine? A. Soft drinks and wine?

Q. Yes. A. Yes, that's right.

Q. Now, at the time Mr. Collins became interested in your place of business, isn't it a fact he paid you \$3,500.00?

A. No, it is not a fact.

Q. What did he pay you?

A. Nothing. He paid me the \$450.00 for the first and last months' rent. [61]

Q. Is it your testimony he did not pay you \$3,500.00? A. That's right.

Q. What was the arrangement that you and Mr. Collins had immediately after Mr. Collins procured the original license? A. What is that?

(Testimony of Stanley E. Lefringhouse.)

Q. What arrangement did you and Mr. Collins have after Mr. Collins procured the original license?

A. The agreement was to be that I was to have the license. When Mr. Collins put it in his own name, he wanted \$5,500.00, cash.

Q. I am speaking after the operation of the business.

A. I was just the manager. He had me go down to the State Board of Equalization and file as manager and be fingerprinted. That was in about July.

Q. Were you to get a percentage from the operation? A. No; I was supposed to get a salary.

Q. Were you paid the salary during that period? A. No, I was not.

Q. Who has the books and records of the business? A. Mr. Collins has most of them.

Q. Did you turn them over to him? [62]

A. Well, yes, one set of books he took, at the time he took the liquor and things, he took some records.

Q. Do you know when that was?

A. I would say that was in about, I couldn't say exactly, the last time, when he took out the liquor he took whatever records was behind the bar there, and that was in December, 1954.

Q. Do you have any records at all?

A. Very few.

Q. What do you have?

A. I have some of the payroll sheets, where they pay the labor and social security, and how much

(Testimony of Stanley E. Lefringhouse.)

was withheld on social security, and I have some of the sales tax records.

Q. Do you have possession of those records now?

A. Some of them, yes, I do.

Q. Mr. Lefringhouse, isn't it a fact that you were to pay Mr. Collins \$250.00 a month for the operation of the business before it was sold to Mr. Litchenfeld?

A. No, that is not true. That would be illegal.

Q. Your liquor store, is that in the front of the premises?

A. The liquor store of my wife and I is in front of the store, yes. [63]

Q. How were deliveries of merchandise made?

A. It is divided into two sections, and there is no door between the sections.

The Referee: That is not the question. When you bought liquor, who was it billed to?

A. When I buy liquor at the liquor store?

Q. Yes.

A. It is billed to my wife and I, under the names of Stanley and Norine at 13113—13115 San Antonio.

Q. Is liquor delivered in pint bottles?

A. All sizes, "on" and "off" sales. You can order it in pints, if you want.

Q. In connection with the operation of the liquor place, a cocktail bar, did you purchase any pint bottles of liquor?

A. I think we purchased pints or anything else. There would be tenths.

(Testimony of Stanley E. Lefringhouse.)

Q. As a general practice you would order liquor in pint bottles for the cocktail bar, wouldn't you?

A. There is two sizes of bottles, pints and tenths.

Q. In pints.

A. Yes, you might, not on any pouring whiskey.

Q. Not as a general rule? A. No.

Q. Would you order it in half-pints? [64]

A. No.

The Referee: Mrs. Carver, I think that is immaterial now. It is quite obvious that this gentleman ordered liquor for the liquor store operated by the partnership and also for the cocktail bar. Now, if he ordered liquor for the cocktail bar and used it in the liquor store, that is a matter between Mr. Collins and Mr. Lefringhouse, but not necessarily a matter between Mr. Collins and the seller.

(Discussion.)

Mrs. Carver: I might say to the Court now that this \$2,300.00 is in error. It is \$1,800.00.

Q. (By Mrs. Carver): In connection with the deal with Litchenfeld, did Litchenfeld pay for the stock of liquor in the cocktail bar at the time he took it over? A. I can't recall on that.

Q. Did he pay to you the sum of \$1,800.00 for the stock of liquor?

A. I can't recall that. There was money put in escrow to go both ways, and I don't recall. There was \$3,000.00 in the escrow, which Mr. Collins knows, but of that \$1,600.00 went to salesmen, or goods; and there were escrow fees so I that I imagine there was about \$800.00 of the \$3,000.00 left.

(Testimony of Stanley E. Lefringhouse.)

Q. Of the moneys paid into escrow were any moneys paid out of the escrow at all for that liquor stock? [65] A. No.

Q. The furniture that is in the place, how much of the furniture was in the premises when Mr. Collins first entered into the picture, in 1953?

A. I would say about one-half of the fixtures.

Q. Since that time other fixtures have been purchased? A. That's right.

Q. Would you tell from what source the purchase price was obtained?

A. From my own personal money.

Q. Was it from the operation of the cocktail bar? A. No.

Q. Did you tell Mr. Collins at any time that you were applying payment on the purchase of furniture and not paying it to him? A. No.

Mrs. Carver: That is all, your Honor.

(There being no further question the witness was excused.)

JOHN A. COLLINS

recalled.

Examination

Q. (By Mr. Tobin): Mr. Collins, this list of accounts receivable that your counsel handed me a few minutes ago, is that a list of accounts receivable that you claim are due you?

A. That is true.

Q. Can you tell the addresses of any of those parties you list here?

(Testimony of John A. Collins.)

The Referee: Let us not bother about addresses now.

Mr. Tobin: I would like to offer this in evidence.

The Referee: Petitioning creditors' Exhibit No. 3. [67]

Q. What is this Lefringhouse item of \$1800, or \$2300? Is that an asset?

Mrs. Carver: Yes. I might explain, because those were just rough notes I made and I did not intend they be given—but I did not extent the \$1800—that is not on that—that is on the statement of assets.

Mr. Tobin: I will put it in as his statement.

The Referee: Petitioning creditors' Exhibit No. 4.

Mrs. Carver: I might say the \$2300 refers to accounts receivable and the \$1800 is not extended.

Examination

Q. (By the Referee): Mr. Collins, you heard the testimony of Mr. Lefringhouse, that you and he gave your brother a note for \$4100?

A. That is true and correct.

Q. What was it?

A. As of May 11th, when I took back the bar, Stan Lefringhouse and I made an agreement that between us we would become partners. At that time I got the escrow, and everything—what I valued the bar and he valued the bar at—in the agreement with him—was the indebtedness against the bar; and with the discounting of the indebtedness—of

(Testimony of John A. Collins.)

the sale—in other words, the bar we figured at \$14,400; the indebtedness was approximately \$7500, I believe. Now, Stan had some money coming from it—in the event the deal went through, he some money coming—about \$1400—and I had \$5500 coming. In order for him and I to become partners [68] we took the \$1400 he had, and \$5500 that I had, and we subtracted the \$1400 from the \$5500, which left \$4100. When I had moved out I had borrowed some money from my brother, to the extent of \$3500 or \$3600—I owed him. And what I did—I transferred the note. In other words, Stan and I were going to give the note to Larry; Stan and I would be on equal footing, and we would all be happy.

Q. You never gave Mr. Lefringhouse a partnership interest, did you? A. No.

Q. You still claim the license as your asset—are you not claiming the license?

A. I have not claimed it as an asset.

Q. You transferred it to de Carlo?

A. Yes.

Q. You did not give Lefringhouse anything out of the transfer? A. I did not get it.

Q. You did not give him anything, did you?

A. No.

Q. You are now claiming to own the fixtures?

A. Yes.

Q. What did he get for the \$4100?

A. He has a right to it, sir.

(Testimony of John A. Collins.)

Q. Then he has a right in the fixtures, is that right? A. That is very possible. [69]

Q. Yet you peddled the license without any consideration of any kind?

A. It was not the reason; that was not the idea.

Q. Why did you give this license away?

A. It was going to expire.

Q. Why did you give it away?

A. What else was I going to do with it? It would do no one any good.

Q. Why didn't you give it to the man who was going to enter into partnership with, who had given you a note for \$4100?

A. Because I would not stop the arrangements we had—we would enter into a corporation.

(Witness excused.)

HAROLD HARRIS

a witness, being first duly sworn, testified as follows:

Examination

Q. (By Mr. Tobin): Mr. Harris, you are an agent for William A. Wylie, the receiver in bankruptcy in this proceeding? A. Yes.

Q. And as such did you contact the bankrupt, John Collins, shortly after Mr. Wylie's appointment as receiver? A. Yes, sir.

Q. Where were you able to contact him?

A. At his home.

Q. Did you make an inventory of the stock of [70] liquor he had stored out there? A. Yes.

(Testimony of Harold Harris.)

Q. Did you make demand on him for any other assets?

A. I asked Mr. Collins were there any other assets any other place, and he said "no."

Q. Did he tell you he had cash in his possession consisting of uncashed compensation checks in the sum of \$1500? A. No, sir.

Q. What did the stock of whisky you found out there in his garage inventory, approximately?

A. About \$500.

Q. Did he tell you he had an unliquidated claim against Davis Piping and Ream Manufacturing Company, on which he had been offered a settlement of \$3500? A. No.

The Referee: There is no use going over the details. He testified that Mr. Collins told him he had no other assets.

Mr. Tobin: That is all.

Cross Examination

Q. (By Mrs. Carver): Mr. Harris, when did you first see Mr. Collins? How long ago was that?

A. About five weeks ago.

Q. Where did you see him five weeks ago? [71]

A. I never saw him; I spoke to him on the telephone. I spoke to him at various times up until last Saturday, when I took the inventory.

The Referee: When did you take the inventory?

A. Last Saturday.

Q. (By Mrs. Carver): Saturday was the first time you have actually seen Mr. Collins, is that right? A. Yes.

(Testimony of Harold Harris.)

Q. Did you ask him about any other claims or anything he might have?

A. I asked him: "Are there any other assets that I should know about?"

Mrs. Carver: That is all.

(There being no further questions the witness was excused.) (Discussion and matter continued to Monday, November 14, at two o'clock p.m.) [72]

[Endorsed]: Filed November 10, 1955.

[Title of District Court and Cause.]

Monday, November 14, 1955, 2:00 O'Clock P.M.

Mr. Tobin: If your Honor please, since the adjournment of court and the receiving in evidence of a statement of assets of the bankrupt, we have had an investigation made into the value, and whether or not the bankrupt has assets. At this time we would ask the Court to reopen the case for further testimony on the part of the petitioning creditors.

The Referee: Is there any objection?

Mrs. Carver: No objection.

The Referee: Motion granted. Proceed.

HAROLD HARRIS

a witness, being first duly sworn, testified as follows:

Examination

Q. (By Mr. Tobin): I believe you have heretofore testified that you were an agent for Mr. Wylie, the Receiver? A. Yes.

(Testimony of Harold Harris.)

Q. And engaged with him in the handling of assets in connection with the bankrupt's estate?

A. Yes.

Q. Now, did you make any attempt during the last week to appraise the household furniture of the bankrupt? [74]

A. Yes, sir.

Q. Where did you go to look at that furniture?

A. At Mr. Collins' home, in Whittier.

Q. Where is that?

A. No. 10423 Townley Drive, Whittier.

Q. Were you able to gain access to his home?

A. No.

Q. Just tell the Court what efforts you made to view these assets during the last week.

A. Friday morning, November 11th, I met Mr. Stern at the address of Mr. Collins' home, about 8:30. We talked several minutes outside of the house, and then I rang the bell, and there wasn't any answer. And, so, we said we would wait a while to see if someone would come back. I rang the bell half a dozen times within a period of about one hour or an hour and fifteen minutes and I still did not get an answer, and I left.

Q. Did you attempt to contact the bankrupt by telephone?

A. Yes, Friday afternoon, November 11th.

Q. Did you get any answer? A. No.

Q. Then did you make any further attempt to contact him?

A. Saturday morning I called again, on [75] November 12th.

(Testimony of Harold Harris.)

Q. Did you get an answer?

A. It seemed to me like a little girl answered the phone.

Q. Did you get to talk to the bankrupt?

A. No.

Q. Then when did you try to get him again?

A. This morning, at 7:45.

Q. Did you get him?

A. It seemed like it was the same little girl again, and she said her father was not at home.

Q. You did not get a chance to talk to him?

A. No.

Q. Did you get a chance at any time to make an inventory of the stock of liquor that the bankrupt keeps in his garage? A. Yes.

Q. Did you take that inventory in writing?

A. Yes.

Mr. Tobin: Now, while counsel is examining the written inventory, I will ask you to state with regard to the condition of the bottles, as to whether they were open or closed?

A. Well, the greater percentage of the liquor is open.

Q. Is open liquor marketable? [76]

A. I can only tell you what has happened in the past.

The Referee: Let us keep within the rules of evidence. It calls for this gentleman's opinion. It would not carry any weight with this court whatsoever what he says—with all due respect to Mr. Harris.

(Testimony of Harold Harris.)

Q. (By Mr. Tobin): The written inventory that you took did indicate what bottles were intact and what bottles were open? A. Yes, sir.

Q. Will you please tell us on which pages of this inventory are contained the bottles that were intact? A. Pages 3 and 4.

Q. What pages indicate the bottles that were open? A. I think I misunderstood you.

Q. Which ones were intact?

A. Pages 1 and 2.

Q. And on what pages are those that were open?

A. Pages 3 and 4.

Q. Are you familiar with the market value of liquor?

A. I use Patterson's book for my value. In this case I used the Patterson's.

Mr. Tobin: I would like to offer this inventory [77] in evidence, if the Court please.

The Referee: This is Petitioning Creditors' Exhibit No. 5.

Q. (By Mr. Tobin): When you and Mr. Stern were out there at the bankrupt's home did you see the Ford car out there? A. Yes.

Q. Whereabouts?

A. It was in the driveway.

Q. Did you look it over? A. Yes.

Q. Will you state to the Court what condition the car was in?

A. The front of the car was up on some metal racks, and I think the transmission was out; and

(Testimony of Harold Harris.)

there were some other parts of the car laying in the garage, which was open.

Q. Did you see anybody remove any of the mechanism of that car? A. No.

Q. On any of the trips you made out there? A. No.

Q. Have you ever had an opportunity to see the bankrupt's household furniture?

A. I went in at the time of taking of the liquor inventory from the front of the house into the bedroom. [78]

Q. And what did you see in there?

A. Well, in the closet, on the top shelf and the shelf below there was a certain amount of liquor, which I have inventoried.

Q. Did you ever see the phonograph records that the bankrupt listed at \$1,000.00? A. No.

Q. Did he tell you at the time you took the inventory of the liquor, or at any other time, that he had one thousand phonograph records worth \$1,000.00? A. No.

Q. Did you ever see these tools that the bankrupt has listed, of the value of \$1,000.00?

A. Well, like Friday morning, when I was out there at the garage, it was open, and I didn't want to enter the garage, because I did not think I could; but from the outside of the garage it seemed like in the back of the garage, there seemed to me to be a welder, about thirty inches high and twenty-four inches wide and twenty-four inches around, on each side 24 by 24 by 30.

(Testimony of Harold Harris.)

Q. Do you know anything about the reasonable market value of such a machine?

A. I imagine, from my past experience, around \$200.00, if that is what this was.

Mr. Tobin: You may cross-examine. [79]

Cross Examination

Q. (By Mrs. Carver): Mr. Harris, at the last hearing in connection with this matter, were you asked the following question and give the following answer:

“Q. What did the stock of whisky you found out there in his garage inventory, approximately?”

“A. About \$500.00.”

A. Yes.

Q. That was your idea as to the value of the inventory?

A. At that time. I had only written it up; I had not picked out the amount of money. It seemed like there was that much. I could have been mistaken.

Q. But you gave as your estimate \$500.00?

A. Yes.

Q. The automobile you testified concerning, did you observe the license number?

A. No, I did not.

Mrs. Carver: That is all.

Examination

Q. (By the Referee): Mr. Harris, when did you take the inventory, which is Petitioning Creditors' Exhibit No. 5?

(Testimony of Harold Harris.)

A. I took that about three weeks ago, on a Saturday. [80]

Q. Three weeks ago? A. Yes.

Q. Before you testified previously in this case on November 4th, is that right? It was before that time you took the inventory?

A. I think it was.

Q. And how have you indicated on the inventory the bottles which were open?

A. I indicated it by breaking them into tenths.

Q. Will you point one out to me so that I can see how you marked it?

(Witness indicating.)

Q. You are showing me the last page.

A. Yes.

Q. You are showing the first item on that page, which is 9/10 of a quart of D.O.M. liquor?

A. That's right.

Q. That is a bottle that is open? A. Yes.

Q. On the page immediately preceding that you have some bottles that are marked 3/10?

A. Yes.

Q. That is the way you figured it?

A. I figured in tenths, because it is easier to figure with tenths. [81]

The Referee: Anything further?

Mr. Tobin: No.

Mrs. Carver: No.

(Witness excused.)

WALTER F. STERN

a witness, having been first duly sworn, testified as follows:

Examination

Q. (By Mr. Tobin): What is your occupation?

A. An adjuster.

Q. For what organization?

A. The Credit Managers' Association of Southern California.

Q. How long have you done that work?

A. Over thirty-two years.

Q. During the thirty-two years you have worked for the Credit Managers' Association of Southern California and its predecessors, have you had occasion to handle stocks of all kinds? A. Yes.

Q. And are you familiar with the value of cars?

A. Yes, sir.

Q. And of liquors? A. Yes.

Q. Now, I will ask you if, pursuant to a request from our office, you made an appointment to meet [82] Harold Harris at the home of the bankrupt on November 11th? A. Yes.

Q. And at what time did you arrive there?

A. I arrived there about eight o'clock.

The Referee: Well, Mr. Tobin, I don't think that Mrs. Carver will dispute the fact you tried to see the furniture but did not.

Mr. Tobin: I meant something else.

The Referee: All right.

Q. (By Mr. Tobin): Mr. Stern, standing in

(Testimony of Walter F. Stern.)

the driveway of the place where you met Mr. Harris was there a Ford car?

A. There was a Ford, yes.

Q. Before Mr. Harris arrived there did anybody take anything out of that Ford car?

A. Yes.

Q. Just tell the Court what you saw.

A. There was a young man, blond, came out of the house, opened the door of this Ford, and took out some pieces of mechanism, and went out to the curb—there was a Chrysler convertible there—and put these pieces of mechanism in the Chrysler, closed the door, and went back into the house again.

The Referee: Let me ask—where was the mechanism in the car in the driveway? [83]

A. He opened the door and took it out, and presumably——

Q. Don't presume. Just tell us what you saw. However, you did not see him raise the hood and remove some mechanism from the car, did you?

A. No, he opened a door.

Q. Of the passenger compartment?

A. Yes.

Q. Where did he put it in the Chrysler?

A. He put it on the floor of the passenger compartment.

The Referee: All right.

Q. (By Mr. Tobin): What was the condition of the Ford with regard to being jacked up?

A. The front part was jacked up, and the drive shaft was down on the concrete.

(Testimony of Walter F. Stern.)

Q. Are you familiar with the market for used phonograph records? A. Yes.

Q. Do you know what they are selling for apiece at the present time?

A. Around five cents each. Did you say used ones?

Q. Yes. A. Yes, sir.

Q. Did you get any view of the bankrupt's tools? [84]

A. Well, after this young man put this piece of mechanism in the Chrysler and went back into the house, a short time later he came back out of the house again, got in the Chrysler and drove away.

Q. And did you take a look into the garage?

A. I just came up with Mr. Harris into the driveway. The door was open, and I just casually looked in. I didn't make any specific mental notes of what was in there at all.

Q. Assuming that furniture was bought about two years ago at a cost of \$4,000.00 and was given ordinary use in a household, could you tell us what would be the reasonable selling value for furniture, given a buyer willing to buy and a seller willing to sell, at a reasonable time to convert the furniture into cash?

A. Well, it depends upon the conditions. If it had been badly misused it could be as low as \$750.00, or even lower than that if the upholstery at the time had been burned; if it had been properly taken care of it could be \$1,600.00 or \$1,800.00.

(Testimony of Walter F. Stern.)

Q. Would you say that furniture purchased two years ago at a cost of \$4,000.00 would be worth \$1,000.00 today? A. No.

Q. Or last August? A. No. [85]

Mr. Tobin: That is all.

Cross Examination

Q. (By Mrs. Carver): Mr. Stern, do you know just what it was that the young man took out of the automobile?

A. No; I think it was some piece of mechanism that was in one hand. I cannot guess, I did not see it. I saw him pick it up and take it out.

Q. You are not in position to say whether or not it was a part of the car that was sitting in the driveway?

A. No, I wouldn't know whether it was part of the car, except it was a part.

Q. Mr. Stern, what would be your testimony if these records constituted a collector's item, what would be your idea of the value of a record that was a collector's item?

A. If it was a collector's item and a complete album it could be in any specific amount; it could be \$4,000.00, \$5,000.00 or \$10,000.00, if it was a complete album of some particular person whose popularity exists; but if it was just a used one, it would be different.

Q. You testified as to five cents for used records of no particular value. A. Used record.

Mrs. Carver: That is all. [86]

(There being no further questions, the witness was excused.)

LLOYD D. CRAYNE

a witness, having been first duly sworn, testified as follows:

Examination

Q. (By Mr. Tobin): What is your profession or occupation?

A. I am employed at the Pacific Employers' Insurance Company as the assistant claims manager in the Workmen's Compensation Department.

Q. Are you familiar with the claim that has been asserted by this bankrupt, John Collins, against the company?

A. Yes, sir.

Q. What is the status of that claim at the present time?

A. It is in litigation before the Industrial Accident Commission.

Q. Has your company denied liability?

A. Yes, we did.

Q. And the matter is still in litigation?

A. Yes, sir.

Q. Now, will you tell us whether or not any notice of liens have been filed against that claim?

A. Yes, we have received two notices. [87]

Q. What are they?

A. The Department of Employment of the State of California filed a lien September 12, 1955, in the sum of \$1,010.00; and the Prudential Insurance Company of America filed a lien April 20, 1955, in the sum of \$30.00.

(Testimony of Lloyd D. Crayne.)

Examination

Q. (By the Referee): Are there any other liens?

A. That is all that have come to our file.

Q. What is the nature of the claim which was made?

A. Workmen's compensation insurance.

Q. Suffered by whom?

A. By Mr. Collins.

Q. In whose employ?

A. Two employers, at least that we know of, the Rheem Manufacturing Company is one and the other is the Davis Pipe Company.

Q. Is it one claim or two claims?

A. It is two claims but they have been consolidated under one action. I believe there is a third action that has been filed.

Q. You are the insurance carrier for the Rheem Manufacturing Company and the Davis Pipe Company?

A. That is correct.

Q. You understand there may be a similar claim [88] against someone else where the insured contractor would be sued?

A. Yes.

Q. Are these claims made in a specific dollar amount?

A. No, they are not.

Q. They are made for injury suffered, is that right?

A. They are made to secure the benefit under the Labor Code, not for specific amounts.

Q. But, in any event, Mr. Collins asserts that while in the employ of these companies that you cover he was injured?

(Testimony of Lloyd D. Crayne.)

A. That is correct. Yes, that the injuries arose out of his employment on two different occasions.

Q. Your company has denied liability?

A. They have, in both cases.

Q. Have you given any reason for your denial of liability? A. I am sure we have.

Q. What reason have you given?

A. We did not believe the injuries did occur in the course of his employment.

Q. Your position is that it is not a covered injury? A. That is correct. [89]

Q. Has the matter been formally brought to the attention of the Industrial Accident Commission?

A. Yes, there have been two hearings and the matter has been continued to another date.

Q. Does it have some kind of a title or name or number?

A. The Industrial Accident Commission No. 55 LA-156-924.

Q. Your understanding is there were three separate injuries consolidated in that one action?

A. I saw a note in my file which says, "Requested all three injuries be consolidated under one heading." That is all I know of the third one.

Cross Examination

Q. (By Mrs. Carver): Are you the attorney, Mr. Crayne, who handled this claim for the Department? A. No.

Q. You are the investigator?

A. No; I work in the office.

(Testimony of Lloyd D. Crayne.)

Q. Are you familiar with what has been brought out at the various hearings?

A. As to details?

Q. Yes.

A. Well, no. At the conclusion the attorney would make his report, but the matter is still in litigation. [90]

Q. Are you familiar with any offers that might have been made by your company for settlement?

A. No, I couldn't tell you about that. The attorneys handle that.

Mrs. Carver: I believe that is all.

(There being no further questions, the witness was excused.)

Mr. Tobin: If the Court please, we are caught in rather a peculiar situation. I subpoenaed the Vista Escrow Company, and Mr. Waltreus has also been subpoenaed by the Superior Court of Long Beach for this morning; no matter which way he turned he was faced with two subpoenas; and he is not here. The escrow is a claim against Lichtenfeld, \$3,000.00. We have the papers and we have the escrow, but we don't have the parties.

The Referee: Maybe Mrs. Carver will stipulate that if the witnesses were here they would testify to certain things.

Mrs. Carver: I wonder if I might look at that.

Mr. Tobin: Sure.

Mrs. Carver: Thank you.

(Looking at document.)

Mr. Tobin: Will you stipulate that the witness

Waltreus, if present, would testify that the sum of \$3,000.00 was deposited in escrow No. 1123-LB, [91] showing transfer from John Collins dba John's Stage Coach and Stanley E. Lefringhouse to Juanita F. Lichtenfeld, 834 West Huntington Boulevard, Arcadia, California, opened on January 14, 1954, has remaining in it at the present time, after the payment of disbursements therefor, the sum of \$123.08.

Mrs. Carver: Yes.

Mr. Tobin: You so stipulate?

Mrs. Carver: Yes, if he were present that he would so testify.

Mr. Tobin: Would you stipulate that the witness Waltreus, if present and testifying, would testify that the escrow contains a demand on Juanita F. Lichtenfeld and/or Juli, Inc., a California corporation, requiring them to deposit the balance of the purchase price in the escrow hereinbefore described, without stating any sum, but stating that unless this money is deposited within five days from date hereof legal action would be commenced against against the purchasers for rescission, and the purchasers to be held responsible for all damages sustained by Stanley E. Lefringhouse and John A. Collins, under date of May 4, 1954.

Mrs. Carver: May I see that?

(Looking at document): I so stipulate.

Mr. Tobin: I would like to examine Mr. Collins under Section 21-A. [92]

JOHN COLLINS

a witness, having been first duly sworn, testified as follows:

Examination

Q. (By Mr. Tobin): Mr. Collins, showing you the demand that has been stipulated to be the escrow No. 1123-LB, is that your signature on there? A. It does appear to be, yes.

Q. Did you ever start any suit against Juanita F. Lichtenfeld or Juli, Inc.? A. I did not.

Q. And they were the proposed purchasers of your liquor business? A. That's right.

Q. You never started any suit?

A. No. You mean legal?

Q. Yes, any legal proceeding of any kind?

A. No. We have talked of it.

Q. Now, you have listed that interest in that escrow at \$3,000.00 in your list of assets that you have brought into court.

A. I believe so.

Q. And you have made no effort to collect it?

The Referee: That is what the man says.

Mr. Tobin: May I see the list of accounts receivable? [93]

The Referee: You may.

Q. (By Mr. Tobin): Mr. Collins, you have listed under "accounts receivable" "Bill's check, \$16.50." Will you please tell us how a person could go at collecting this bill? What is the address?

A. I don't know. I could very easily locate it.

Q. What is his name?

A. I couldn't even tell you that; but I see him

(Testimony of John Collins.)

quite often. Some time ago I collected one of \$45.00. That is why if he is crossed off.

Q. What is the \$15.00 that is after it? You have the word "Seitz" scratched out. A. Yes.

Q. And \$15.00 typed in after the \$45.00.

A. These are moneys given out in cash; in other words, on this side here. This here side was for merchandise or something on that order. This is actual cash.

Q. Isn't it true that these are bar bills incurred prior to December, 1953, in a beer place which you ran?

A. Around December, 1953, is when we come to this amount, or this list, that is true.

Q. And those are bar bills?

A. Well, some of them; they are not all bar [94] bills. Some are checks. Some are for cash given, a five (dollar) bill, or something like that.

The Referee: Wait a minute. Were all these obligations incurred in one way or another in the operation of this bar? A. Not all.

Q. For instance, what ones have no relationship to the bar?

A. This man Seitz—I paid a payment on his car. He gave me the money back.

Q. Is he still listed?

A. No, he is crossed off.

Q. Do you have any other instances like that?

A. I got a check from a "Bill," \$16.50. It was a check he gave me and I took it to the bank.

Q. Why did he give you the check, for what?

(Testimony of John Collins.)

A. Money I had loaned him out of my pocket.

Q. At the bar? A. No.

Q. Outside of the bar? A. Yes.

Q. (By Mr. Tobin): These all go back to December, 1953, or sooner? A. I would say yes.

Q. Who is this fellow "Dutch," who is listed for \$77.45? [95]

A. He is a man that comes in the bar, and it is a bar bill.

Q. At which bar? A. The Schooner Cafe.

Q. You don't know what his last name is?

A. No. He lives in the 4300 block on Olive Street. I could point out the house; I could take you there, or something like that.

Q. What about "Clete"?

A. Another fellow, that was at the bar.

Q. And "Shorty Sharpe"?

A. He lives right close to the bar.

Q. That is \$37.05. Is that for a bar bill?

A. I believe that part of it is cash.

Q. And you have "T. A. Sharpe."

A. That is a brother of his.

Q. Who is "Lloyd, \$100.00"?

A. I believe that was for his pay check I cashed for him at the bar. There was some kind of a mixup on the pay check and for some reason or other they would not cash it because it was not signed properly.

Q. Where does he live?

A. He lives on Florence Place, I believe, on the

(Testimony of John Collins.)

corner of Florence Place. There are some motels there, and he lives right next to them.

Q. And who is this "Nolan"? [96]

A. He lives at Bell Gardens.

Q. What was that for, \$10.50?

A. I believe that was for the bar.

Q. Then you have "Paul, \$1.55."

A. He used to clean the place—clean up around there.

Q. Who is "Spohn, \$10.25"?

A. Well, he is the man that sells Mercury-Lincoln automobiles.

Q. You don't know where he lives?

A. No, but I see him once in a while.

Q. What about "Smitty"? Where does he live?

A. I could not tell you where he lives.

Q. What about "Jimmy & Cliff, \$2.85"?

A. That is a bar bill.

Q. And "Bart"?

A. That is this man's last name.

Q. How much would you be *willing for* those accounts receivable, you yourself?

A. I am not about to buy them.

Q. No, but if you were given the opportunity to buy them, would you pay \$2,200.00 for them?

A. Well, naturally, money in hand is worth more.

Q. What would you, as the owner of the accounts receivable, what would you say they were actually worth? [97]

(Testimony of John Collins.)

A. If you collect them all they are worth \$2,200.00.

Q. What is the chance of collecting them all? Are all of them collectible?

A. The most of them, I would say the chance is pretty good.

Q. Without the aid of a collection agency?

A. I believe so. I would say I had a lot more than that and I collected some.

Q. How would you locate people like "Smitty" and "Clete" and "Tex"? For instance, "Tex, \$27.55," how would you locate him?

A. Do you mean just to go out and look for him or wait until some time I see him and ask him for it? That is about the way I would collect those bills.

Q. Have you, outside of this one payment that you say was made recently by Seitz been able to get any payments on any of the accounts since December, 1953?

A. On that list?

Q. Yes.

A. There is more than one list.

Q. I am talking about these particular accounts that you claim are assets.

A. I have not tried to collect all of them.

Q. Now, you also list among your assets [98] Uncashed Compensation Checks. Demand was served on your counsel that you produce these uncashed compensation checks. Do you have any of them with you?

A. I believe that notice was served on me or

(Testimony of John Collins.)

my counsel on the 10th of November; and if I had the checks yet they would be of no value because they are only good for sixty days.

Q. Where are they? A. I cashed them.

Q. You listed them.

A. They are not all uncashed. There was cashed and uncashed checks as of the bankruptcy filing date.

Q. You list cash in the possession of debtor, to wit, uncashed compensation checks, \$1,500.00. Now, how many uncashed compensation checks did you have when this case came to trial before this court a little over a week ago, I believe a week ago Friday?

A. I don't believe at that date I had any uncashed.

Q. What uncashed compensation checks did you have in your possession on August 22, 1955?

A. To be perfectly honest and exact, I couldn't tell you; but I do know that there was some and there was some cash as of the 22nd day of August. I did not even know it was filed against me for [99] two or three days after it was filed. I had no idea they were going to do it.

Q. After the petition was filed and after you learned a receiver had been appointed, did you have any uncashed compensation checks in your possession? A. I don't believe so.

Q. Do you recall that you called Mr. Weller right after the petition was filed and telling him

(Testimony of John Collins.)

that you would be at your home to receive the service of the involuntary petition?

A. When was this?

Q. About the 25th of August, about three days after the petition was filed.

A. I don't think it was that soon; but I did call Mr. Weller and ask how I could check on the involuntary bankruptcy—about it being served on me; and I called the United States Marshal and told him where I was, and asked him what time I could meet him; he brought the things down and served me.

Q. You told Mr. Weller at the time you called him, did you not, that you would come in from the beach and would be at your home at a certain time?

A. At any time convenient to the Marshal.

Q. You received service under those circumstances, is that right?

A. I received service that there was the [100] bankruptcy petition filed.

Q. Now, at the time you had your conversation with the United States Marshal and with Mr. Weller, did you have in your possession uncashed compensation checks of the value of \$1,500.00?

A. I doubt that very much.

Q. Did you bring in your list of alleged assets, including uncashed compensation checks and cash in the sum of \$1,500.00 with the intention of making this court believe that you had that amount in cash or uncashed compensation checks in your possession?

A. In combination of both?

(Testimony of John Collins.)

Q. Yes.

A. In combination of both I believe I had \$1,500.00 of compensation money as of approximately that date.

Examination

Q. (By the Referee): Let us clarify that. What do you mean by "compensation"?

A. The disability money the insurance company pays me.

Q. Which insurance company?

A. The Pacific Mutual pays me \$20.00 a week; and the State pays me \$35.00 or \$40.00 a week.

Q. How long has that been going on?

A. It goes for six months. It started, I think, [101] around January 27th.

Q. Is that because of some injury?

A. That's right.

Q. And where did you suffer this injury?

A. At the Davis Pipe Company, on my job.

Q. The Pacific Mutual is paying it?

A. There is an arrangement with our union that the employer must carry this compensation insurance on the employees, at no cost to the employee. If we are off work for any reason they will pay us \$20.00 a week.

Q. Who are the Pacific Employers' Insurance?

A. They are the carrier for the accident. It is like a compensation case.

Q. It all arises out of the same injury?

A. That is true.

Q. And the State is paying you some money?

(Testimony of John Collins.)

A. That is true.

Q. And the Pacific Mutual? A. Yes.

Q. And the Pacific Employers you want to pay you some money? A. Yes.

Q. All out of the same accident?

A. Eventually they are, I presume.

Q. Are you still getting these checks?

A. I don't know. [102]

Q. Where were you working when you were hurt? A. For the Davis Pipe.

Q. And when were you hurt?

A. In December.

Q. You also were hurt when you were working for the Rheems Manufacturing Company?

A. That is true.

Q. Which happened first?

A. The Rheems Manufacturing Company.

Q. Is the Pacific Mutual paying anything on account of the Rheems Manufacturing Company?

A. No.

Q. Is the State paying anything on account of the Rheems Manufacturing Company?

A. I don't believe so. I believe it is all for this accident in December.

Q. December, 1954? A. That is true.

Q. How often do these checks come?

A. Sometimes once a month, sometimes every five weeks.

Q. No; they don't do business that way.

A. Sometimes every week.

(Testimony of John Collins.)

Q. They should come at regular intervals. The State checks are paid weekly or monthly? [103]

A. I believe it is every three weeks or four weeks. I don't know exactly whether it is monthly or not. I don't believe it is.

Q. The Pacific Mutual, is that weekly or monthly?

A. When they pay, it is usually around \$80.00—I would say monthly, about every four weeks, sometimes.

Q. How were you paid at the Davis Pipe Company, weekly or monthly?

A. In wages, weekly.

Q. Are not the Pacific Mutual checks always in the same amount? A. No, sir.

Q. They are not? A. No.

Q. How much do they vary?

A. Well, anywhere from \$25.00 to \$200.00.

The Referee: Well, I don't think there is any use going on with a witness like this, Mrs. Carver. That is just contrary to all common knowledge of disability payments, unless this is a most exceptional set-up. Once that disability payments become payable, they are paid at regular intervals, in the same amount, for a certain length of time. Now, this man is going to have to bring in something more than just his naked word for it; and we are going to have some information as to when [104] these checks were cashed. That, again, is against common conduct. People as a rule, when they are getting compensation checks, they do not

(Testimony of John Collins.)

pile them up; although I must say that we did have one or two cases where the bankrupt had received checks for months and had put them in a drawer and had never done anything about it.

Mr. Tobin: May I ask a question?

The Referee: Yes.

Q. (By Mr. Tobin): You are married?

A. Yes, sir.

Q. How big a family do you have?

A. Three children.

Q. A wife and three children? A. Yes.

Q. Does your wife work? A. Now, yes.

Q. (By the Referee): Ordinarily does your wife work? A. No.

Q. When did she start working?

A. About three weeks ago.

Q. Before that time she did no work outside of the home, is that right?

A. That is somewhat correct.

The Referee: I don't want the record to show that she did no work, because most mothers and [105] married women do work.

Q. (By Mr. Tobin): How did you support your family when you were accumulating these checks until they amounted to \$1,500.00?

A. There was a disagreement upon the amount of the checks and paid in such an unusual manner for the fact that the insurance company stated they did not feel there was an injury—they felt I was not injured, and therefore they withheld the checks. Then, all of a sudden, they started paying. Then

(Testimony of John Collins.)

they stopped, and then they started. I went to the hospital on June 10, 1955. At that time, the day I went into the hospital, the insurance company still insisted on the fact that there was nothing wrong with me. On June 15th they removed a disk from my spine; and right up to that time, as a matter of fact, they did not offer to pay the doctor or the hospital or anything. And, so, as of the day I went to the hospital, I gave my wife, well, our life savings, I will say, to live on while I was in the hospital, because I figured I could be in there about fifteen weeks.

Q. Where were your life savings?

A. At home.

Q. Not deposited in any bank? A. No.

Q. In what form?

A. Money, cash money. [106]

Q. Currency? A. Yes.

Q. Kept where? A. In my home.

Q. In a tin box or a sock?

A. In a paper envelope.

The Referee: Let us clear this up. When did you go to the hospital?

A. June 10th or 11th, 1955.

Q. What was the date when the application was made for the transfer of the license?

A. I believe August 5th.

Q. August 5th? A. That is correct.

Q. 1955. Well, Mr. Tobin, we are not concerned with June 10th. There are only two days that are material. One is August 5th, if that be the correct

(Testimony of John Collins.)

date of the application for transfer; the other is August 22nd, the date of bankruptcy.

Q. (By Mr. Tobin): Have you brought in the policy of insurance that you scheduled as having a cash value of \$1,700.00?

A. That is in reference to all the insurance policies.

The Referee: You may examine those during the recess. Go ahead. [107]

Q. (By Mr. Tobin): Now, with regard to this car—how many cars have you in your family?

A. There is two cars.

Q. What are they?

A. One is a 1951 Chrysler; the other is a 1952 Ford.

Q. And on November 11th where was the 1952 Ford?

A. I really couldn't tell you exactly.

Q. Was it in the driveway of your home?

A. It possibly could have been.

Q. Was it jacked up?

A. It was jacked up—however, I did not see it jacked up, or I did not see it in the driveway.

Q. Was it out of repair?

A. I could not tell you. I doubt very much if it was out of repair. It could have been, but my boy drives it most of the time. He is a "teen-ager." I don't know what he is doing with it.

Q. Who has the Chrysler?

A. My wife usually drives the Chrysler.

Q. It stands in her name?

(Testimony of John Collins.)

A. That's right.

Q. But this \$600.00 car, that you put in as of a \$600.00 valuation, is the Ford?

A. That's right. [108]

Q. You heard Mr. Harris and Mr. Stern testify concerning it, is that right?

A. The \$600.00 valuation?

Q. Yes.

A. I would say it was worth \$600.00.

The Referee: Mr. Tobin, again it is immaterial what the car was like on November 11th. Our critical dates are August 5th and August 22nd.

Q. Now, this "claim for damages against," then there is a blank, "for medical expense advanced in connection with injury to son." Who is the "blank" you have got this claim against?

A. It is against the All State Insurance Company.

Q. Who is the man who injured your son?

A. I could not tell you offhand. The attorney would have it. It is being in litigation.

Q. I notice in your liabilities you list Queen of Angels Hospital, Dr. Benton, Dr. Johnson, Dr. Pheasant, Dr. Foley, Dr. Chapman, and Dr. Bailey. Which of those were doctors that attended your son?

A. Dr. Bailey.

Q. His bill is \$267.50?

A. That is the present bill up to August 22nd, or up to today.

Q. Is there any litigation pending with regard [109] to that claim for damages?

A. Yes, sir.

(Testimony of John Collins.)

Q. In what court?

A. I don't know what court it is. Attorney Raoul Magana is taking care of it. He is an attorney in Los Angeles.

Q. You have had suit filed?

A. I believe so.

Q. You have had suit filed as guardian for the boy?

A. Yes.

Q. And the suit was filed on his behalf?

A. I couldn't tell you.

Q. You made claim on the boy's behalf, didn't you?

A. On his and mine.

Q. (By the Referee): How old is the boy?

A. Now he is 11.

The Referee: I think the father may have some claim, I don't know.

Mrs. Carver: The father would be the one.

Q. (By Mr. Tobin): On what do you base the \$400.00 figure you put in the list of assets?

A. This man run the boy down, and they had to take the boy to the hospital in an ambulance, they smashed up his bicycle; and I had to have a [110] doctor and various bills of that nature. He was unconscious for a short time; and the bills I paid—I had to replace the bicycle; I had to pay the doctor, the hospital, and all that stuff. This one for Dr. Bailey—he happened to be the doctor for me; but that is not the bill for the boy. Dr. Bailey was taking care of me, for my back injury.

Q. You had five doctors on the back injury?

A. I believe it was only five.

(Testimony of John Collins.)

Q. Maybe six?

The Referee: There could be.

Q. (By Mr. Tobin): In regard to these tools, tell us just what tools you did have out there?

A. They are everything from small wrenches, crescent wrenches, screw drivers and hammers. There is an electric welding machine with cables, and so forth. There is a vise, a cut-off saw—any number of things like that.

The Referee: It may be that if we get too far along this line it will be necessary for Mr. Collins to exhibit those things to appraisers selected by the petitioning creditors—the household furniture, the tools, the car, and everything else. We are not gaining much information by this line of questioning, because it is simply Mr. Collins' best recollection of what he now has and his best estimate of [111] what the things are worth. Let us just hold that in abeyance until as and when the evidence relating to the transaction is in.

(At this point a brief recess was taken after which the following proceedings occurred.)

Q. (By Mr. Tobin): Mr. Collins, do you have any books or records of your business at all?

A. Of the Stage Coach or the Schooner?

Q. Any books or records.

A. Yes—I do not, but my attorney does.

Q. Your counsel has handed me three Manila-covered records. I will ask you to examine those and tell us what they are.

(Testimony of John Collins.)

A. The first one is a sales record; that one is a balance sheet; and that is the general journal.

Q. How far does the balance sheet go, how late?

A. I believe it is January 18, 1954.

Q. And how far does your general journal go?

A. I believe they all three go up to September 31, 1953. There is an extra sheet in the balance sheet.

Q. You discontinued keeping books, then, as early as January, 1953, at the very latest?

A. No.

The Referee: I think the record is quite clear. In January, 1954, there was an attempted sale of this business to Mr. Lichtenfeld. Lichtenfeld went into possession and remained in possession perhaps [112] until April or May.

Q. (By Mr. Tobin): Then, after he gave up possession there were these negotiations between the other gentlemen and Mr. Collins that were supposed to lead up to some kind of partnership or some kind of a corporation; and that is one of the big question marks of this whole case. Who operated the business after Lichtenfeld got out? Was it Collins or the other gentleman (Lefringhouse), or was it a partnership business? I will ask the question—who operated the business after the Lichtenfeld deal fell through?

A. Lefringhouse was the manager.

Q. Who was the owner?

A. Lefringhouse and myself.

(Testimony of John Collins.)

Q. What percentage of the income did Lefringhouse get? A. All of it.

The Referee: I think we went over that before. There appears to be no formal agreement of partnership—that is Collins' view of it—that he either owned the business in its entirety or as a partner. I think Lefringhouse's contention is he owned the business, or he owned the fixtures—no, he owned the business. After all, it does not seem to be in dispute that Lefringhouse and Collins executed a note in favor of Collins' brother in the sum of \$4,100.00. Lefringhouse must be [113] getting something, or must be entitled to get something for that note because he is being sued for it. Go ahead.

Q. (By Mr. Tobin): Now, taking up these insurance policies——

The Referee: One moment. I am going to make an observation. We are favored with the attendance of quite a few people. If any of the people are here as potential witnesses, it would seem to me we ought to begin to take care of them. Some of them may have been here on November 4th and were ordered back here. I don't know whether we will get through this afternoon.

Mr. Tobin: As far as I am concerned, he would be our last witness. If the Court wants to go ahead with the defense on the order I would make no objection.

The Referee: I would suggest that if you have any witnesses who might be on the stand only a few moments that you ought to take them out of

(Testimony of John Collins.)

order, without prejudice, that you might have after the petitioner's case is in, if you move for dismissal. Do you have any witnesses?

Mrs. Carver: Yes.

The Referee: I am going to insist you do that. I don't want to have the responsibility of telling these people to come back again if we can dispose of them this afternoon.

Mr. Tobin: It is perfectly agreeable to me.

The Referee: Mr. Collins may step down; and [114] any witnesses called by the alleged bankrupt, the fact they are called, shall be without prejudice to the right to move to dismiss on any ground.

(Witness excused.)

WILLIAM EDWARD ERNEST

a witness called by the alleged Bankrupt, being first duly sworn, testified as follows:

Examination

Q. (By Mrs. Carver): Mr. Ernest, are you acquainted with Mr. Lichtenfeld?

A. I am acquainted with Mr. Lichtenfeld.

Q. Is it Harry Lichtenfeld? A. Yes.

Q. What is your connection with him?

A. I was his accountant.

Q. Do you have the records pertaining to his negotiations for the purchase of the Stan's Stage Coach Stop?

(Testimony of William Edward Ernest.)

A. I do not have the escrow papers.

Q. What records do you have?

A. A complete set of books while Mr. Lichtenfeld was operating the bar.

Q. Do you have any cancelled checks delivered in connection with the purchase of the place? [115]

A. Mr. Lichtenfeld has brought several of his checks to court today.

Q. Is Mr. Lichtenfeld here? A. Yes.

Mrs. Carver: Then perhaps he would be the better witness. May this witness be excused?

The Referee: Is this to have the documentary evidence?

Mrs. Carver: I want to prove the payment of money outside of escrow.

A. If I may—will you excuse me for a moment—there is possibly two items Mr. Lichtenfeld does not have that the books of record show were paid.

The Referee: What are they?

A. A check, No. 2, made out January 19th, to Stanley Lefringhouse in the amount of \$500.00 for inventory; and one on January 20th, made out to Stanley Lefringhouse, in the amount of \$589.58. Now, those checks apparently are mislaid, or something; but, as you know, they can be secured—a photostatic copy can be secured from the bank.

The Referee: Were both checks on the inventory? A. Yes.

The Referee: Will you step down, Mr. Ernest, and let us have the other gentleman?

(Witness excused.) [116]

HARRY MARION LICHTENFELD

a witness, having been first duly sworn, testified as follows:

Examination

Q. (By Mrs. Carver): Mr. Lichtenfeld, some time in January, 1954, did you enter into some arrangement to purchase the Stage Coach Stop?

A. Yes, ma'am, I did.

Q. In connection with the purchase did you make arrangements to buy the stock in trade?

A. I did.

Q. How much did you pay for those?

A. For the stock?

Q. The inventory of liquor on hand.

A. The exact figure escapes me, but it was in the amount of, oh, I will say, \$1,500.00 or \$1,800.00. In fact, I have checks in my pocket to show the final balance, because it was one of those "String along" things.

Q. To whom did you direct the check?

A. To Mr. Lefringhouse.

Q. May I see the check you have?

A. Yes, I have several, in the amount of rent, and anything you want to see. Now, this check I am going to give you is the last check I gave him. Anyway, all these are endorsed by Stanley Lefringhouse, and were made out to him, as you can see. Here is the payment in full [117] on the balance of liquor and equipment inventory. These are also made out to Stanley Lefringhouse.

Q. (By Mrs. Carver): I will show you check No. 15, dated April 21, 1954, in the sum of \$333.13,

(Testimony of Harry Marion Lichtenfeld.)

signed by Juanita F. Lichtenfeld, payable to Stan Lefringhouse. You have seen this check before?

A. Yes.

Q. Do you recall where you delivered it to him?

A. Yes, I delivered it to him at his liquor store out there. In fact, I dictated what there is on the back, in order to end all arguments.

Q. You are referring to this statement on the back, "Payment in full on balance of liquor and equipment inventory 13113 San Antonio, Norwalk, California.

A. Yes. That was final payment for that equipment and stock.

Q. Now, referring to check No. 19, April 2, 1954, payable to Stan Lefringhouse, in the sum of \$20.58, signed by Juanita F. Lichtenfeld, have you seen this check before?

A. Well, I have seen all checks. All checks were cleared by me, but this \$20.58 one escapes me right now, what it was for. Undoubtedly Mr. Ernest has an account of it in the books and can give full details.

Q. Would you say, looking at all these checks, [118] March 22, 1954, No. 164; No. 99, April 30, 1954; No. 66, April 16, 1954, were delivered by you to Mr. Lefringhouse? A. That's right.

Q. And where was the delivery made?

A. They were delivered on the premises. No checks were ever mailed; they were taken care of personally.

Mrs. Carver: That is all.

(Testimony of Harry Marion Lichtenfeld.)

The Referee: What do you want to do with the checks?

Mrs. Carver: I don't know whether I can take the checks. A. I have got to keep them.

Mrs. Carver: I will offer these in evidence.

The Referee: You had better remove them.

Mrs. Carver: May we photostat these copies?

A. There are several others I can bring in.

The Referee: The difficulty is, Mr. Lichtenfeld, we cannot tell from these checks themselves whether they relate to the purchase by you of the business or whether they concern purchases of merchandise which you may have made from Mr. Lefringhouse. This one for \$20.58, April 2, 1954, what was that for?

A. Mr. Ernest could probably give you the answer to that. [119]

Q. What was the other one for, \$184.00, March 22, 1954? That is for rent, three months, at \$150.00, \$450.00, less a loanout, \$266.00; balance, \$184.00, being the amount of the check; and here is another one, \$61.26, April 16, 1954, payment on lights for February and March, \$30.21, April 30, 1954, payment for power. It would appear that the payments made in connection with the purchase of a business by Lichtenfeld, the payments are a check for \$500.00; \$589.58; \$333.13. The endorsement on that check is, "Payment in full on balance of liquor and equipment inventory at 13113 San Antonio Drive, Norwalk."

All right. I don't know whether all these checks

(Testimony of Harry Marion Lichtenfeld.)

are really material. Let us have this stipulation, counsel, on both sides, if you don't mind, that counsel may offer photostats of any and all checks; if, as and when he does so.

Mr. Tobin: So stipulated.

Mrs. Carver: So stipulated.

Q. (By Mrs. Carver): Mr. Lichtenfeld, your bookkeeper testified issuing checks for \$500.00 and \$589.58. Did you deliver those checks to Mr. Lefringhouse? A. I did.

Q. Where did you deliver those?

A. Well, at the premises. Everything was a personal operation; there was no mail; it was handed [120] to him in person.

Mrs. Carver: That is all.

Cross Examination

Q. (By Mr. Tobin): Mr. Lichtenfeld, showing you check No. 18, dated April 2, 1954, with the endorsement on the back, "Payment in full on balance of liquor and equipment inventory at 13113 San Antonio Drive, Norwalk," didn't that pertain to liquor in Lefringhouse's liquor store?

A. I believe it reads "Inventory," does it not? I am only saying what is written; it says, "Inventory."

The Referee: He is trying to identify what inventory it is. Let us see if we cannot clear it up. Juanita Lichtenfeld bought certain liquor for the purpose of continuing operations of the business in a certain place, is that right? A. That is right.

(Testimony of Harry Marion Lichtenfeld.)

Q. Now, this check says, "Final payment on liquor inventory."

A. That's right.

Q. What equipment does that refer to?

A. That was the fixtures and six chairs—I owed him for six chairs.

Q. You did not buy all the fixtures?

A. I bought the entire establishment. [121]

Q. Fixtures and all? A. Yes.

Q. For \$333.13?

A. No. This is the final balance. He kept saying I owed him. I don't want to confuse the issue. There is a chattel held by Vista Escrow on all fixtures; but there happened to be five or six chairs in there which I had to include under this thing to finally end all argument.

Q. Don't we have anything in writing with respect to the purchase made by Juanita Lichtenfeld?

A. A written agreement at Vista Escrow.

Q. Is that available?

Mrs. Carver: I don't think it is complete.

The Referee: Well, is not there a written agreement?

Mr. Tobin: We might be able to clear up some of this right now.

Q. Did you have anything to do with an instruction in connection with this escrow?

A. Not too much.

Q. You told them what the facts were from your point of view?

A. We both did—Lefringhouse and myself took

(Testimony of Harry Marion Lichtenfeld.)

care of the entire situation. I was not aware of Mr. Collins until very late in the game. [122]

Q. Did you tell Vista Escrow there was nothing paid the sellers outside of escrow?

A. Where do you read that?

Q. Right in there (indicating).

A. I don't recall whether I said that or not.

The Referee: Well, gentlemen, don't we have something we can get in evidence to show what this deal was? One of our big problems is testimony to determine whether something belonged to Lefringhouse or to Collins or to Collins and Lefringhouse. What I would like to know is, who sold to Lichtenfeld? I want to see whether there is not something in writing. Who are the parties to that escrow?

Mr. Tobin: Stanley E. Lefringhouse and John A. Collins.

The Referee: Just the two of them?

Mr. Tobin: Yes, as sellers, and Juanita F. Lichtenfeld as buyers or corporation nominee. I do not have the foundation of this escrow.

The Referee: Let me ask Mr. Lichtenfeld—when you bought did you make a written agreement that went into escrow?

A. No; there was no written agreement. The escrow was held in Long Beach, the Vista Escrow, which is now defunct—it is here on Wilshire. This is part of the problem. The entire transaction was [123] carried on between Stanley and myself; and when I talked with him, we went to the escrow the following day.

(Testimony of Harry Marion Lichtenfeld.)

Q. Did Mr. Collins enter into the conversation with you about buying the place?

A. Never; and everything, as you can see, I believe was made out to Stanley Lefringhouse—all my checks show it, everything was paid to Mr. Lefringhouse.

Q. You gave up possession of the place when?

A. I can't say the exact date. It is on a rescission which is of record in the escrow.

Q. In April or May, 1954?

A. It must have been April or May—I think it was in June. I was in Hollywood, in another place.

Q. Did you get any of your money back?

A. No.

Q. (By Mr. Tobin): Did you instruct the Vista Escrow Company to include in the escrow the following: There is enumerated the items—furniture, fixtures, equipment, goodwill, lease, trade name, inventory, and so forth. Then it states that the only interest John Collins has is in the wholesale liquor license; that all funds due at the close of the escrow herein to the seller shall be paid solely to Stan Lefringhouse, with no monetary thing of any nature whatsoever [124] to John Collins.

A. I did not put that in there. In fact, I did not recall it was in there.

The Referee: Is that instruction signed by anybody, or is it signed by Lefringhouse?

Mr. Tobin: I do not have a copy which is signed.

The Referee: Where did you get that copy?

(Testimony of Harry Marion Lichtenfeld.)

Mr. Tobin: From the Vista Escrow Company, by mail, this morning.

A. The original is probably still in the escrow.

The Referee: Any further questions?

Mr. Tobin: Nothing further.

Cross Examination

Q. (By Mrs. Carver): Mr. Lichtenfeld, how much did you pay into the escrow?

A. \$3,000.00 in the escrow.

Q. What was that to apply on?

A. That was to apply as down payment on the place.

Q. Did that include the stock in the inventory.

A. No. That was paid outside of escrow to Mr. Lefringhouse.

Mrs. Carver: That is all.

The Referee: Anything else? [125]

Q. (By Mr. Tobin): How much were you *paid* for this?

A. I believe the selling price was \$15-5 or 16.

The Referee: Including the liquor license?

A. Yes.

Q. Plus the inventory? A. Yes.

Q. Now, do you make any claim for the return to you of any part of the \$3,000.00?

A. We have not gotten to that yet. It is still laying in escrow. It has not been pulled down. We have made no lawsuits; we have made a full attempt to settle outside of court.

Q. Have you been here all afternoon?

(Testimony of Harry Marion Lichtenfeld.)

A. Yes—not all afternoon. I got here about 2:30.

Q. Didn't somebody say there was only \$123.08 in the account? A. Yes.

Q. What do you mean by saying it is still there?

A. It is still in escrow. There was a point, whether I got \$3,000.00 or they got \$3,500.00.

Q. When you turned it back did you have any inventory on hand then? [126] A. Yes, I did.

Q. What did you do with it?

A. I turned it back to the boys. There was approximately twelve hundred and some dollars.

Q. Who walked in when you walked out?

A. They were both there, both gentlemen were there.

Q. Did you make an inventory of the items you had on hand?

A. Stanley and I took inventory, and Mr. Collins, I believe, as I recall, wrote it down. Then we totalled it and it was like I say, \$1,200.00 and something, which has never come out.

Q. But you did take an inventory? A. Yes.

Q. Did you pass your right to the things there?

A. Yes.

Q. Did you get a receipt?

A. I have a copy.

Q. A signature thereon, acknowledging it?

A. No; that is where I made a mistake.

Q. (By Mr. Tobin): When you were operating at this location, under what name did you operate?

(Testimony of Harry Marion Lichtenfeld.)

A. Stan's Stage Coach Stop, Juli, Inc. That was our dba.

Q. What liquor license did you use? [127]

A. We were operating at the time under a transfer, a temporary license, which, of course, goes through that procedure; and our license had not cleared from Sacramento; and, consequently, we were operating under the temporary license, issued to Juli, Inc., pending clearance.

Q. In other words, you were operating under a temporary transfer of the Collins' license to you?

A. That's right.

Q. You finally got word you were not going to get a permanent transfer, is that right?

A. It was coming from Sacramento, it cleared transfer, and they pulled a rescission.

Q. Who rescinded?

A. Lefringhouse and Collins on a violation I had in the place.

The Referee: Any further questions?

Q. (By Mr. Tobin): Speaking of that rescission that you referred to, is this the rescission in writing they gave to you?

A. Yes, that is it. I was to deposit approximately \$12,000.00 and release immediately, but I did not do it because I had no license.

Q. You are familiar with the signature of Mr. Lefringhouse?

A. Mr. Lefringhouse brought the document, he [128] could not get out there quick enough, and I would not release the \$12,000.00.

(Testimony of Harry Marion Lichtenfeld.)

Q. He delivered it to you personally?

A. Yes.

Mr. Tobin: I would like to offer it in evidence.

The Referee: All right; Petitioning Creditors' No. 6.

Q. (By Mr. Tobin): Do you contend that you do not owe Mr. Collins anything?

A. I contend that I do not owe Collins or Lefringhouse anything.

Q. Well, Mr. Collins has listed among his assets, "Interest in moneys held in escrow re sale of liquor license to Lichtenfeld, \$3,000.00." Is that disputed?

A. This dispute could be a point of law.

Q. You do not admit you owe Mr. Collins \$3,000.00, do you?

A. Well, that is a disputed point. I don't know whether I owe him. I cannot let you put words in my mouth, because I don't know where I stand, myself.

Q. Well, the question is, do you admit you owe this alleged bankrupt, John Collins, the sum of \$3,000.00?

A. Well, it is a difficult question, your Honor. You understand I am in a peculiar position. [129]

The Referee: If you will let me interrupt, I think you can answer that question.

A. You think I should?

The Referee: I think you should. It is a very simple question. Do you admit you owe John Collins any money at all? A. No, I do not.

Mr. Tobin: That is all.

(There being no further questions the witness was excused.)

WILLIAM EDWARD ERNEST

recalled to the witness stand, having been previously duly sworn, testified as follows:

Examination

Q. (By Mrs. Carver): You have heard the testimony as to the sums of \$500.00, \$589.58 and \$333.13 for inventory? A. Yes, I did.

Q. Do your records show the payment of any other sums to Mr. Lefringhouse for inventory?

A. No, ma'am, our records do not show it. However, they are holding in abeyance certain records pending the closing of this escrow. As you know, your Honor, a complete set of books, meaning fixtures, assets, etcetera, cannot be set up until an escrow closes. There was a check, it was made out, a cashier's check, for [130] \$500.00, paid on inventory.

Q. Is that the check you have testified to?

A. No, that was another one. There were three checks, totaling \$1,500.00 and some dollars and one for \$313.13.

Q. So that the actual payments were \$1,922.63, that was all paid to Mr. Lefringhouse by Mr. Lichtenfeld for inventory?

A. Not all of it was for inventory. Ninety dollars was for six chairs. We have it separated in the books.

(Testimony of William Edward Ernest.)

Q. You may refresh your recollection from the records.

A. We will take the first two checks that the records show, that the check book showed where those two checks I mentioned, in the amount of \$500.00, payable January 19th, and that was for inventory; payable January 20th, there was \$589.58 payable for inventory. Then on April 2nd, I believe, a check was made for \$313.13, of which \$243.13 was for inventory, and \$90.00 for equipment.

Q. (By The Referee): You say there were two checks for \$500.00, January 19th?

A. No, there was one check made out January 18th, in the amount of \$500.00, which was a cashier's check. [131]

Q. In other words, you drew the check to buy the cashier's check?

A. Mr. Lichtenfeld drew the check to buy a cashier's check.

The Referee: Anything else?

Q. (By Mrs. Carver): Do your records show whether or not any profits were made during the Lichtenfeld operation?

A. Yes. We had given Mr. Lichtenfeld monthly financial statements.

Q. Would your records reflect the profits during his operation?

A. These records I hold here; and if they were taken, balance sheets and profit and loss statements could be made from them, I mean, they would reflect in a profit.

(Testimony of William Edward Ernest.)

Q. You cannot tell offhand what the profit was?

A. No, because we had not closed out these records for the purpose of tax returns. However, Mr. Lichtenfeld does have a copy of the financial statement of the closing day.

The Referee: Anything else?

Mrs. Carver: That is all. [132]

Cross Examination

Q. (By Mr. Tobin): Was an inventory of the stock made in January?

A. Yes, sir. As a matter of fact, I believe I had the original copy of that inventory, and I believe it is in with the file at Vista Escrow.

Q. Then, there was another inventory made in April? A. In May.

Q. At the time that the business was surrendered? A. May 10th, yes, sir.

Q. And that inventory differed?

A. Yes, there was a difference between the beginning inventory and the ending inventory.

Q. The beginning inventory was considerably smaller than the closing?

A. The beginning was considerably—I won't say "considerably," but the beginning was larger than the closing.

Q. The beginning inventory was larger?

A. Yes.

Q. And the business was conducted in the meantime? A. Yes.

Q. And liquor was being sold over the bar and [133] dispensed? A. Yes.

(Testimony of William Edward Ernest.)

Q. Do you know whether or not any of the liquor in that closing inventory was the same liquor that was there at the beginning, in January?

A. That is entirely possible, that some of it would be the same.

Q. There is a regular turnover?

A. There is a regular turnover.

Mr. Tobin: That is all.

Redirect Examination

Q. (By Mrs. Carver): Did you have any connection with the operation of the business in an accounting manner after Mr. Lichtenfeld left?

A. I recommended the business for sale, yes.

Q. What was your recommendation as to value?

A. It was not what my recommendation was as to the value. It was what I felt that these people could afford to pay for it. I felt that the business, with the remodeling and everything that transpired between the time Mr. Lichtenfeld left and the time these people were interested, was in the neighborhood of \$30,000.00.

Mrs. Carver: That is all.

Examination [134]

Q. (By The Referee): How long did you continue to have some contact with this particular location?

A. I had no contact with it. However, in my business, I am an accountant. At the time of my original contract with Mr. Lichtenfeld I was employed by E. L. Waltreus, of Vista Escrow Com-

(Testimony of William Edward Ernest.)

pany. I know the bar business, having worked for one of the largest public accounting firms in the United States. They do nothing but handle bars, cocktail lounges, hotels, and so forth. And, so, we built up, along with another gentleman, a public practice, and we occasionally are called upon to audit books by a potential buyer; possibly we may be able to recommend it for sale, that is, a good location, or that it has got potentialities.

Q. You did recommend or were prepared to recommend this place to somebody after Mr. Lichtenfeld got out? A. That is very true.

Q. Can you give us the approximate time?

A. I think I can. It was this last October.

Q. October, 1954? A. Yes.

Q. Now, between the time Mr. Lichenfeld got out and October, 1954, did you keep any books or records for that business for anybody? [135]

A. Not for the Vista Escrow Company, no.

Q. Now, you spoke about remodeling. To your knowledge was there any change made in that location during that period of time, between the time Mr. Lichtenfeld left and October, 1954?

A. Yes, they enlarged the room and made it a much nicer place.

Q. Have you any personal knowledge as to who did that? A. No.

Q. You just know the work was done?

A. Yes.

Q. Have you any personal knowledge as to who paid for it, if it was paid for? A. No.

(Testimony of William Edward Ernest.)

Q. Have you any personal knowledge who did the actual physical work? A. No, I have not.

Q. Or who the contractor was?

A. I did talk to one party at Laguna Beach, just prior to my examination of the bar, looking it over one afternoon; and he told me it had been done by some group of contractors, but I cannot recall the name.

Q. But, apparently, you had the impression that whatever was done had enhanced the value of the particular location? [136]

A. It had, yes, sir.

Q. In your judgment? A. Yes.

The Referee: Any further questions?

Redirect Examination

Q. (By Mrs. Carver): Did you make an offer to purchase it, either on your behalf or anyone else's behalf at or about that time?

A. Yes, we called up Mr. Lefringhouse. I believe it was in October, and I had a buyer from Laguna Beach, a gentleman whose accounts I have handled for two and a half to three years, and he was looking for another bar; and Mr. Lefringhouse told me the bar was not for sale.

Q. Did he make any offer? Did you get that far in the negotiations?

A. No. He was willing to go \$30,000.00 for the place; but we were not able to establish any negotiations with Mr. Lefringhouse.

(Testimony of William Edward Ernest.)

Q. When you say "we," you mean the prospective purchaser who was willing to go \$30,000.00?

A. That is correct.

Recross Examination

Q. (By Mr. Tobin): With regard to the physical improvements [137] there, Mr. Lefringhouse, as a matter of fact, made those improvements, did he not?

A. I do not know. I had no contact with Mr. Lefringhouse or Mr. Collins.

Q. Did you know him personally?

A. I believe I probably have seen him on one occasion or another when I was working for Mr. *Lefringhouse* on the books; but aside from that, no, sir.

Q. Did you know his landlord?

A. No, sir.

Q. Do you know whether or not Mr. Lichtenfeld had a master lease or a sub-lease over there?

A. Did you say Lefringhouse or Lichtenfeld?

Q. Lichtenfeld.

The Referee: Lichtenfeld was renting from Lefringhouse.

A. That is correct. I believe that would be a matter of record with the escrow.

Mr. Tobin: I wanted to find out if you had any record at all, as to whether or not Mr. Lichtenfeld had a master lease or a straight lease, or sub-lease.

A. I don't know.

Q. You have no record of that? A. No.

(Testimony of William Edward Ernest.)

Q. And you don't know when it was they made those improvements? [138] A. No.

Mr. Tobin: That is all.

(There being no further questions, the witness was excused.)

ARTHUR IRWIN RATHMAN

a witness, being first duly sworn, testified as follows:

Examination

Q. (By Mrs. Carver): Are you acquainted with Stanley Lefringhouse and John A. Collins?

A. Yes.

Q. Are you familiar with the place of business known as Stan's Stage Coach Stop?

A. No, when I worked there it was just "Stan."

Q. During what period did you work there?

A. From about July, 1954, until it closed.

Q. (By the Referee): That would be December, would it not? A. Yes.

Q. What was the nature of your work?

A. Bartender.

Q. (By Mrs. Carver): During that period of time what would you say as to the trade, was it very busy, or what?

Mr. Tobin: Objected to, immaterial. [139]

The Referee: I cannot tell. I think he can tell whether it was busy or not.

A. At times it was a pretty good business.

Q. (By Mrs. Carver): You are not familiar

(Testimony of Arthur Irwin Rathman.)

with what the daily receipts were, or were you familiar with what the daily intake from the bar was?

A. Not all the time, no. I know about what it was.

Q. What would you say would be an average a week?

Mr. Tobin: Objected to, immaterial.

The Referee: I don't know what we are getting at.

Mrs. Carver: I want to prove whether or not there was any extensive business during the time Lefringhouse operated this business.

The Referee: What difference would it make?

Mrs. Carver: I don't think very much.

The Referee: I don't think it makes any difference at all. The question is, who owns it now. That is our main problem.

Mrs. Carver: It may be a basis for impeachment of Mr. Lefringhouse's testimony.

The Referee: What part of his testimony?

Mrs. Carver: That there was no progress made, but I doubt if we could prove it. [140]

The Referee: If Collins was not the owner, the matter of profit is immaterial. If he was the owner, it is the value of the date I have already mentioned. Is there anything else?

(There being no further questions, the witness was excused.)

Mrs. Carver: That is all. We rest. [141]

The Referee: This is probably the most confused inventory case we have had here for a long time. It would appear on the face of the record that the only thing of consequence is the solvency or insolvency of Mr. Collins as of about August 5, 1955. Of course, if he was solvent on August 5, 1955, that ends his case, because then there was no fraudulent transfer. The chief issue is really his solvency or insolvency. There is no question at all but what Mr. Collins transferred property of value without consideration; and if he was insolvent at the time it was fraudulent. His only defense to it would be that he was solvent on the date when the involuntary petition was filed.

Now, ordinarily the court does not have too much trouble in determining insolvency. The court can usually determine approximately the liabilities and approximately the value of assets. But the problem in this case is what were assets and what were not assets. In other words, we are required apparently to do the thing here which ought not to be done in a bankruptcy proceeding.

You will remember that Congress tightened up the law as to petitioning creditors. The petitioning creditors have to have a certain status before they will be permitted to throw a fellow citizen into bankruptcy, so that there can be no question about their credit or position. We had cases sometimes in the real old days where persons who were not, in fact—a creditor at least—not qualified [142] exactly to the amount required, who would succeed in throwing a person into bankruptcy; and the appel-

late court would reverse. We have something of the same sort here.

The liquor license unquestionably belongs to Mr. Collins. But what about the rest of this business? We have to determine whether it belongs to Mr. Collins or Mr. Lefringhouse; or whether it belongs to Lefringhouse and Collins. Now, we are going to decide that apparently without Lefringhouse being before the court; yet we are making a determination that so far as this bankruptcy proceeding is concerned it belongs to one of the three, and we could have this peculiar situation: we could have this court ruling that it belongs to John Collins and it is therefore an asset to be taken into consideration in determining the question of solvency; and we could have a ruling by the court that he was insolvent, and we could have an adjudication in bankruptcy; we could have the trustee attempting to take it over from Lefringhouse, and Lefringhouse refusing to yield possession or title; we could have the trustee suing Lefringhouse; and we could have the judge saying it does not belong to the trustee in bankruptcy—it belongs to Lefringhouse.

Now, I don't know whether Congress ever intended that kind of a situation to arise in a bankruptcy proceeding. And, so, before we spend a lot more time in hearing [143] witnesses, I am going to have an "in-between", pretrial conference on this thing, solely from a legal standpoint and determining just exactly what our problem here is and what we are going to do with it. Then we will agree on as many things as can be agreed upon and take evi-

dence on the rest, because I think Mr. Tobin and Mrs. Carver, particularly Mr. Tobin with all his experience in North Dakota and South Dakota will say this is about as mixed-up an involuntary case as he ever got himself snarled into.

Mr. Tobin: I do.

The Referee: So, we are going to find out here what we have got. Here is the thing that concerns me—apparently one sure thing that Mr. Collins had was the liquor license. He deposited that under the rule stated here along about last February. He had the license as a valid license for six months. In the six months' period he filed an application for a transfer, which will be nullified and set aside in the event that the petitioning creditors prevail.

Query—is there still any license of any value? I think you had better put one of the liquor-law lawyers on that, and find out what is going to happen if a trustee is appointed here and he does attempt to take over all rights under this liquor license what he can do [144] with it, if anything; or whether the Board of Alcoholic Beverage Control will take the position there just is not any more license, it has expired. And also remember this—it is the impression of this court that the transfer involved in the application is void as a fraudulent conveyance; but does the judgment of this court automatically set it aside; and will the trustee in bankruptcy have to sue this person to whom the transfer was made, which is a part of the application for transfer? And if he does how long is that going to take; and if he does succeed in that, by

that time will the license have any transferrable rights left; but, of course, there are not any really transferrable rights—the so-called purchaser merely asks it be transferred. The trustee in bankruptcy has no power to actually transfer it.

And, so what about these other witnesses here now?

* * * * *

Does anybody represent Mr. Lefringhouse?

Mr. Forrest: Yes, I do. * * * * *

The Referee: You may require further testimony from Mr. Lefringhouse because this question of ownership is very much confused; and, incidentally, I am afraid that we do not have all of the written instruments that we would like to have in situations like this.

Mr. Tobin: I am going to bring Mr. Waltreus.

The Referee: I don't think that will be necessary. [145] However, if Mrs. Carver feels she would not be able to stipulate——

Mrs. Carver: Yes, of course, that can be done.

The Referee: Now, then, what I have in mind—I am going to excuse the witnesses. What about next Monday, November 21st for an “in-between” conference? There will be no other evidence; but anybody that wants to be here and listen to what is said—everything will be said right out in open court—anybody who wants to come will be welcome. [146]

[Endorsed]: Filed Nov. 21, 1955.

[Title of District Court and Cause.]

Monday, December 5, 1955

JOHN COLLINS

a witness, having been previously duly sworn, testified as follows:

Mr. Tobin: I am calling this witness under the provisions of Section 21-J.

Examination

Q. (By Mr. Tobin): You just heard Mr. Stern and Mr. Harris testify regarding the money you had on hand you could have paid the local creditors off with on the date of filing of the petition.

A. I heard the testimony.

Q. What is the fact with respect to that?

A. I believe there was a misunderstanding.

Q. What did you say?

A. Well, we got talking whether I knew that they filed a bankruptcy against me. I said I did not know they had for several days afterwards; that I was down in Los Angeles one day, or in the Internal Revenue Office at the time I was notified that there had been the filing. Mr. Weston had called Mr. Martinetti and told him I was in bankruptcy, and it was at that particular time that I became aware of it. I was talking to another man in [148] the Internal Revenue, going to make payment to the Internal Revenue of approximately \$2,000.00 that day, to cover the taxes. They said Mr. Martinetti and Mr. Gruenwald figured it up, and would take \$2,000.00, to wait until the tax arrangement had been decided,

(Testimony of John Collins.)

as to how much I owed and how much Mr. Lefringhouse owed them. Now, that is perhaps where they are confused. I said if I could make the arrangements, with a deposit of \$2,000.00, and go ahead and put it up as collateral, to go ahead with the rest of my plans, that I would at that time make an arrangement with creditors, all the creditors up to that date, and come to a settlement as to how much I owed and how much Lefringhouse owed, I would make payment, but I could not make payment of everything all at once, because I only had that money to pay the Internal Revenue.

Q. Whereabouts were you, physically, at the time that you came in here and talked to the Internal Revenue Department about your tax difficulties? A. Home.

Q. Physically at home, were you at the beach or in Whittier? A. In Whittier.

Q. You were not out at the beach around that time?

A. I was at the beach the following week, or [149] the following month.

Q. You remember calling Mr. Weller a day or so after the petition was filed, don't you?

A. I called Mr. Weller on the phone, I think it was on the following Thursday—I think they filed it Monday, and the following Thursday I called him.

Q. You told him you were staying at the beach, did you not?

(Testimony of John Collins.)

A. I was at the beach at the time, or I was going.

Q. You told him, also, you would make it a point to be at Whittier and accept service on the involuntary petition, did you not?

A. I asked him if I would be served, what would happen. He told me the United States Marshal would be out to serve me, and how could I locate the man, because maybe I won't be home. And I called the Marshal and told him where I was at that particular time, and I would be down to meet him—which we did. He set a time, and I said, "I will meet you at the house," at such and such a time; and he went ahead and gave me the papers. I think that was on the following Saturday or Sunday, because he said he didn't have the papers ready.

Q. Later you filed a petition to dismiss the creditors' petition, without an attorney?

A. Yes. [150]

Q. Now, then, you set up in the Answer that you were solvent. I believe you put in some insurance policies with a value of \$1,700.00.

A. I believe so.

Q. And in response to a direction by the Court you brought the insurance policies up to the Receiver?

A. The next day.

Q. Now, isn't it a fact that most of these insurance policies that you claim a cash surrender value on are policies on somebody else's life?

(Testimony of John Collins.)

A. They are policies on my children's lives, if that is what you are referring to.

Q. And you are claiming the cash surrender value on policies on your children's lives?

A. Yes. Can't I? I pay it. I believe I am beneficiary on the major portion of them.

The Referee: Just a moment. Let us not have any argument; just let us have the facts; let us identify the policy in the record and then we can determine whether John Collins has the right to secure a cash surrender value; let us not take the time right now; let us get the facts.

Q. (By Mr. Tobin): Showing you a policy No. 16,245,450, issued by the Metropolitan Life Insurance Company of New York, on the Life of John R. Collins, who is John R. Collins? [151]

A. My son.

Q. Give us his age. A. Sixteen.

(Reporter's notation): Here follows detailed testimony with respect to the insurance policies, and other assets, including the household furniture, liquor, television, records. The reporter is omitting same from the record unless and until it is called for later.) [152]

Q. Now, did you pay any taxes on the equipment in that bar during the years 1954 or 1955?

A. What kind of taxes?

Q. Any kind.

A. I did through the medium of Mr. Lefringhouse.

Q. Mr. Lefringhouse has paid the taxes?

(Testimony of John Collins.)

A. That is true. He used my money to do that.

Q. What do you mean by using your money? Did you give him the money?

A. He took the money out of the register for the general run of the bills in the business.

Q. Now, in whose name did the title to the equipment in that bar stand?

A. Well, that would be pretty hard to determine, in a way. A lot of it was bought from a lumber company and brought in and installed. I don't know that you would have a name on it, for that type of equipment.

Q. Who is holding the lease?

A. The master lease is held by Mr. Lefringhouse, I believe.

Q. How much rent have you paid on those premises since August 22, 1955?

A. Since August 22, 1955?

Q. Yes. A. I am not paying any rent.

Q. How much rent have you paid on those premises [153] at any time during 1955?

A. The money came out of the register.

Q. I am talking about you.

A. When you talk about me, that was my money in that register.

The Referee: That matter is in the record. Mr. Collins has not paid any rent except through the medium of Mr. Lefringhouse, through cash which resulted from operation of the business, which never came into his possession; he personally, directly, did not pay any rent. That is in the record.

Mr. Tobin: That is all.

The Referee: Let us take the noon adjournment.

Mrs. Carver: I have a witness here from the bank who will only take a few minutes.

The Referee: All right.

MRS. TEMPERANCE BAILEY

a witness, having been first duly sworn, testified as follows:

Q. (By Mrs. Carver): During 1951 were you connected with the Bank of America in Whittier?

A. Yes. [154]

* * * * *

(Whereupon, a recess was taken until 2:00 o'clock this day, at which time the following proceedings occurred):

Mr. Tobin: I would like to ask Mr. Collins a few more questions.

JOHN COLLINS

having been previously sworn, testified further as follows:

Q. (By Mr. Tobin): When you came out from New York and bought this furniture, from what source did the money come that you bought the furniture with?

A. It come out of my bank account.

Q. Your bank account? A. Yes.

Q. That you earned? A. Yes.

Q. And from what source did the money come that went into your home?

A. My bank account.

Q. Your bank account?

(Testimony of John Collins.)

A. Yes. I say "my"; I will say mine and my wife's.

Q. That you had earned since marriage?

A. Oh, yes.

Q. And with regard to the insurance policies, with the exception of this Columbia policy, in Boston, out [155] of what source were the premiums paid on those policies?

A. I paid them; I paid them to the insurance companies.

Q. And these premiums were paid out of your own earnings?

A. Yes, I would say so.

Q. And subsequently to your marriage the premiums on the Columbia policy were likewise paid out of your earnings?

A. I believe so. Wait a minute—my father originally had that policy. We got that policy from my father, after we were married.

Q. And who paid the premiums?

A. Previously or after?

Q. After.

A. I paid them after that—my wife and I.

Q. Out of what source?

A. Funds we earned.

Q. You earned? A. Yes.

Mr. Tobin: That is all.

The Referee: I assume you do not want to cross-examine at this time?

Mrs. Carver: No.

(There being no further questions, the witness was excused.) [156]

STANLEY E. LEFRINGHOUSE

a witness, having been previously duly sworn, testified further as follows:

Q. (By Mr. Tobin): Mr. Lefringhouse, with regard to the bar fixtures at No. 13113 South San Antonio, Norwalk, California, who paid for those bar fixtures?

A. I did, out of my own funds, money I borrowed myself.

Q. Did you take any money out of the cash register in 1955 that belonged to Mr. Collins?

A. No.

The Referee: Wait a minute. You were the manager for Mr. Collins, were you not?

A. That is true.

Q. And whatever money you took in, into the cash register, you paid out? A. Yes.

Q. Who paid the taxes during 1955 on those fixtures?

A. Well, the taxes that were due, the first Monday in March, 1955—Mr. Lichtenfeld was there at the time, and due to the escrow, there was a mixup. They were due in March, 1954; and, so, in about February, 1955, the next thing I knew they were way overdue, and the Government came to me and said that as long as the fact that my fixtures [157] didn't go through the escrow, with the Lichtenfeld deal, that I was liable for the taxes—in February, 1955, it seemed like I paid \$180.00 and I included penalties and everything, because they were late. They were due in March, 1954, and I had to pay them in February, 1955.

(Testimony of Stanley E. Lefringhouse.)

Q. Did you pay them out of your pocket?

A. Yes, I did; and right after that, in March and April, they were due again, and I paid them again for the year 1955, when they were due and payable, the first Monday in March, 1955; and, so, this year I have had to pay twice.

Q. Who has paid the rent on the premises at 13113 South San Antonio, Norwalk, during the year 1955? A. I have.

Q. Who paid it during the year 1954?

A. I did.

Q. Did Mr. Collins ever pay any of the rent over there?

A. He paid the first and last months' rent—he paid two months in the year 1953—\$450.00, as I recall.

Q. To whom? A. To me.

Q. Do you know of anything over there, in the place at 13113 South San Antonio, Norwalk, that, in your opinion, belongs, or that any interest therein, belongs to [158] Mr. Collins?

A. No, there is nothing. I notice in the list of liabilities there is one lumber bill they sent him, which, I don't know how much it is, and that was a mistake. That is the only item, that bill there, should be my bill—the Norwalk Lumber Company.

Q. What did it amount to?

A. I don't know—\$100.00, or something—unless he ordered some lumber for himself, at his house, but that should be my bill.

Q. What was it for?

(Testimony of Stanley E. Lefringhouse.)

A. Well, we were going to build a patio—I was going to build a patio there, and my landlord talked me out of it. That lumber was for the patio, and it was never built; and my landlord talked me into this deal where I added on the back, built a whole building.

Q. Do you know what became of the glassware that was in that bar?

A. No, I wouldn't know what became of that glassware. Today was the first day I ever heard Mr. Collins mention some glassware.

Q. Had there been glassware in the bar prior to his going in out there?

A. Yes; there has always been glassware in there.

Q. Did he let you know he was taking it out?

A. No.

Q. Did he let you know he was taking liquor out?

A. No, not the one day when I was not there,—he came over and took the license and took the liquor, and then he came back the next day, and that day, why, he didn't let me know right away, but after he got in there I came at the time he was there, and then I knew he was taking it out. I didn't stop it.

Q. Did he take it out with your consent?

A. Yes, he did.

Q. Did you know where the liquor went?

A. No, at that time I didn't know where he was taking it. He did not take an inventory, or any-

(Testimony of Stanley E. Lefringhouse.)

thing—no inventory at the time he took it out at all.

Q. Is there any liquor left there now?

A. No, none.

Q. Could you describe to the best of your ability what fixtures are there that are in that place at the present time?

A. Well, there is two built-in bars and a built-in piano bar; and there is a built-in, a large built-in cage, for keeping parakeets, and a built-in place for natural flowers. Then, there is some booths; and about, I would say, twelve tables to go in front of those booths—about twenty-four chairs to go in [160] front of the booths. There is approximately fourteen bar stools. I am just estimating this, and chairs around the piano bar and the other built-in bar, there is about thirty chairs. Then there is some couches and a rug; light fixtures; two back bars and two bar boxes, dry beer; and three jockeys, where you put ice, and a sink. In the kitchen there is a deep freeze, a large stove with an oven, a French fryer, a steel table, a slicer, a regular, level sink; two or three tables, equipment like pots, pans and ladles. A Neon sign outside that says "Cocktails." There is a Neon sign on top, and that says, "Stan's Bar." Naturally, a lot of items I have forgotten.

Q. Who paid for the equipment that could be removed from the building without damage to the building?

A. I did.

Q. And what, in your opinion, would be the reasonable market value of those fixtures and that

(Testimony of Stanley E. Lefringhouse.)

equipment, given a purchaser who was willing to purchase, on reasonable notice, a seller who was willing to sell, on reasonable notice, and excluding a forced sale?

A. Well, in other words, you just mean to sell the equipment right out?

Q. Under the hammer.

A. It would not bring in over, I would estimate, \$1,500.00—\$1,000.00 to \$1,500.00 that way. [161]

Q. Do you claim the exclusive ownership of that equipment? A. I do.

Mr. Tobin: You may cross-examine.

Cross Examination

Q. (By Mrs. Carver): Mr. Lefringhouse, you stated you had paid the rental on the cocktail bar?

A. Yes; I had the master lease and I paid the whole thing.

Q. From what source did you take the funds to pay the portion of the rental on the cocktail bar?

A. From the liquor store.

Q. Did you take it out of the register during the operation of the business? A. No.

Q. Did you charge the operation of the business with any portion of the rental? A. No.

(Mrs. Carver showing document to Mr. Tobin.)

Mr. Tobin: I am wondering why these books and records were not turned over to the Receiver.

Q. (By Mrs. Carver): Mr. Lefringhouse, in July, 1954, is it your contention that Mr. Collins

(Testimony of Stanley E. Lefringhouse.)

had no interest in the fixtures? A. Yes. [162]

Q. I will show you notice of intended mortgage, reading: "Notice is hereby given: That John Collins and Stanley E. Lefringhouse, Mortgagor, whose address is 13113 South San Antonio, in the City of Norwalk, County of Los Angeles, State of California, intends to mortgage to Lawrence Collins, Mortgagee, whose address is 7420 Duchess Drive, in the City of Whittier, County of Los Angeles, State of California, all fixtures and equipment of a certain tavern and cafe business known as Stan's Stagecoach Stop, and located at 13113 South San Antonio, in the City of Norwalk, County of Los Angeles, State of California."

Now, does this notice of intended mortgage cover all fixtures in that place of business?

A. This was when John Collins was going to sell the license to me, which I have explained in this court before; and I was going to mortgage this equipment; and he and his brother talked me into an agreement where I make a note and mortgage to his brother, and he and I would sign it and his brother could discount the note, and with the mortgage get the money immediately. That deal never went through. Mr. Collins would never go into escrow with the liquor license, and I never would go through with the mortgage.

Q. Is that your signature?

A. Yes. That is an intended mortgage, but it [163] was never mortgaged.

Mrs. Carver: I would like to have it marked.

(Testimony of Stanley E. Lefringhouse.)

The Referee: Bankrupt's Exhibit No. 1.

Q. (By Mrs. Carver): Were the books and records of Stan's Stagecoach Stop kept under your supervision? A. No, not altogether.

Q. Who kept the books and records?

A. In the year 1953 there were no books or records for either the liquor store or the bar; and, so, when we got to about October, 1953, we just got everything together and gave to Mrs. Hartke, and she tried to decipher them, a lot of things there she put down on the books. She did not know which to charge to, the liquor store or the bar.

Q. You mean that everything was thrown together?

A. Yes, I just gave it to her.

Q. You have seen this statement before, have you not? A. Yes.

Q. Now, under this statement of "Rent," \$1,500.00 and \$300.00, a total of \$1,800.00, will you explain what that covers?

A. She took the rent—at that time the master lease—I was paying \$150.00 a month rent, and [164] *the* just took each rent receipt and put it there. Mr. Collins was supposed to pay me \$225.00, which would be more than that, but he never paid me.

Q. This is a profit and loss statement of Stan's Stagecoach Stop, by you?

A. What do you mean?

Q. As manager.

A. Yes. During that period I was manager, but

(Testimony of Stanley E. Lefringhouse.)

this lady, she did not know which went to which, and she was all mixed up, and she knew it was not right.

Q. Do you know what this item of rent is?

A. It is not correct.

Q. During this period in 1953 what rent was paid for the cocktail bar? A. By who?

Q. In connection with the liquor store?

A. In connection with the liquor store?

Q. I mean the cocktail bar.

A. In the year 1953 Mr. Collins paid me \$450.00 rent—period.

Q. Yes on this statement there is this item of charge.

A. Yes. I saw the slip where the rent had been paid to the landlord, at \$150.00. She did not know [165] where to put it and put it in there. There are a lot of items that should be on the bar and some items on the bar which should be on the liquor store.

Mrs. Carver: I will offer this as the next exhibit.

The Referee: Bankrupt's Exhibit No. 2.

For the sake of the record, Mr. Lefringhouse, under what name did you run the liquor store?

A. "Stan's Liquor Store."

Q. (By Mrs. Carver): I will show you a general journal of Stan's Stagecoach Stop, and it has no name on it, but it is a list of equipment, bar, booths, et cetera, and ask you if this forms a part of the equipment in the cocktail bar?

(Testimony of Stanley E. Lefringhouse.)

A. It forms part of the equipment, yes.

Q. Can you state when that equipment was purchased, as to whether it was before or after Mr. Collins became associated with you?

A. All the stools were purchased before. The bar was made to order before. The rest rooms were there before. The partitions were there before. The lights were there before. This was just before Mr. Collins was associated with me. Is that your question?

Q. No, I am asking when they were purchased. I will change my question. Were those items purchased after you and Mr. Collins commenced business?

A. After. Mr. Collins and I did not commence [166] business together.

Q. You might call out from this list the items purchased after Mr. Collins was connected with Stan's Stagecoach Stop.

A. After he was connected with the—he put the liquor license in there in June, 1953; the stools were right in there, and the booths; the boxes, the storeroom—I don't know what the storeroom is. The rest rooms were there. The partitions were there. This was all before Mr. Collins was there—the walls, the dance floor, I don't recall.

Q. As a matter of fact, these were put in, were they not, during the early part of 1953, preparatory to Mr. Collins coming in?

A. Some of them.

(Testimony of Stanley E. Lefringhouse.)

Q. Will you call off the items which were put in there during 1953?

A. During 1953 all these items except the stools, the bar. There was a beer box there already. The booths were made over. There was one jockey box. You have listed one. There were three. One jockey box was there before. The rest rooms were there before; the partitions; the lighting. Most of the asphalt tile floor was there in the year 1952.

Q. The items that were purchased in 1953, preparatory to Mr. Collins coming into the business, [167] who paid for those items?

A. I did.

Q. From what source?

A. I borrowed money from an attorney named Joseph Shane, of Los Angeles, \$2,500.00, and paid for the equipment.

Q. Did you take any of the money out of the cash register in the operation of the business?

A. I did not.

Q. Did you make any payment of any sort with any funds in connection with the cocktail bar for the purchase of the equipment?

A. Not that I recall, not at all, no.

Q. I notice a total here of \$5,179.00. Was that the valuation placed on those fixtures at the time?

A. I would not know that, because all the fixtures were not there.

Mrs. Carver: I want to offer this.

The Referee: Bankrupt's Exhibit No. 3.

(Testimony of Stanley E. Lefringhouse.)

Q. (By Mrs. Carver): During 1953 were the premises remodeled? A. Yes.

Q. During what month was that, do you recall?

A. It extended over three or four months, off and on.

Q. You don't recall whether the early part of [168] the year or when?

A. Right at the early part of the year, January; and I would say it went on until June or July, but not steady.

Q. Who paid for the remodeling?

A. I did.

Q. Did Mr. Collins pay any part of that?

A. No.

Mrs. Carver: That is all.

(There being no further questions, the witness was excused.)

Mrs. Carver: I wonder if I might call a witness out of order.

The Referee: You may.

DONALD H. McADAMS

having been first duly sworn, testified as follows:

* * * * *

JOHN COLLINS

resumed the witness stand and testified further as follows:

Examination

Q. (By Mrs. Carver): Prior to coming to California where did you [169] live?

A. Niagara Falls, New York.

(Testimony of John Collins.)

Q. At the time of your marriage to Ada Collins, did you have any moneys of your own?

A. No.

Q. You accumulated money, did you, after your marriage? A. Yes.

Q. Where did you keep those moneys, in the State of New York?

A. Usually; well, some at home and some in the bank.

Q. Where did you live, or, where do you live now?

A. 10423 Townley Drive, in Whittier.

Q. That place was purchased, was it, after you and Mrs. Collins came to California?

A. That is true.

Q. From what source was the money obtained to purchase that property?

A. From the bank—the Power City Trust Company—a bank in Niagara Falls, New York.

Q. Those were funds that were accumulated through your earnings, during your marriage?

A. Yes, and my wife. The account was in the name of John A. and Ada J. [170]

Q. What was the purchase of the real property?

A. \$13,100.00.

Q. After the purchase price of the property were any improvements made on the same by you and Mrs. Collins? A. Yes, there was.

Q. Would you state what improvements were made.

A. Between the house and the garage, there was

(Testimony of John Collins.)

a patio built there, about 16 by 22; a fireplace on the patio; a roof over it; a small door cut through the garage, so that we would not have to open the big door; there were flood lights in the patio that was there originally, and one I built. I put the lights in and the wall plugs, electric sockets now out there, and the lights out on the sidewalk-way going outside, two-way switches on them; fluorescent lights in the garage; a water softener; I had a guest room; and flood lights in the back yard, and plugs out to the other patio.

Q. What is your estimate of the amount paid by you in these alterations?

A. Everything about \$2,000.00.

Q. What is your opinion as to your value of your home today?

A. I think it is worth at least \$15,000.00.

Q. I will show you here a grant deed, dated December 7, 1951, to Ada J. Collins, a married woman, and ask you if that covers the property where you and Mrs. [171] Collins now live.

A. Yes, it does.

Q. Did you instruct the escrow department handling the transaction for the sale of this property to place the title to the property in the name of Ada J. Collins? A. No.

Mr. Tobin: Objected to, attempting to vary the terms; hearsay; incompetent, irrelevant and immaterial.

Mrs. Carver: Your Honor, I was asking if he instructed that the title be placed as it appears.

(Testimony of John Collins.)

The Referee: You are asking for a conclusion.

Mrs. Carver: I asked what he did.

The Referee: No, you asked if he instructed. It calls for a conclusion.

Q. (By Mrs. Carver): Mr. Collins, at or about the time the escrow was opened in connection with the sale of this property, did you have any conversation with a Mrs. Bailey, the escrow officer at the bank? A. I did.

Q. Who were present at the conversation?

A. Well, at the first one there was Mrs. Hogin, my wife and myself, and Mrs. Bailey—the four of us.

Q. Was there anything said at that time about the escrow?

Mr. Tobin: Objected to, hearsay insofar as these petitioning creditors and all creditors of the alleged bankrupt [172] are concerned; a self-serving declaration; incompetent, irrelevant, immaterial. I would think it alters the terms of a written instrument.

(Discussion.)

The Referee: It does not alter the terms of the written instrument at all. The written instrument—the escrow instruction—is signed by the wife?

Mr. Tobin: Yes.

The Referee: This was for vesting of the property in the wife. It does not vary it in the slightest degree. Objection overruled.

Mr. Tobin: Subject to a motion to strike?

(Testimony of John Collins.)

The Referee: Yes. Tell us what the conversation was.

A. We got to talking about buying the house there, and I had just come to California. I had explained to Mrs. Bailey, the escrow officer, that I had paid \$100.00 down on this house. My wife had seen it and she liked it and I liked it, we were all happy. We agreed on the price, \$13,100.00. This was just before Christmas, I don't remember what date it was, but about the 17th, I think, and we wanted to try to move in before Christmas so that the kids could have a tree and everything. Mrs. Hogin was objecting to us moving in unless we could prove we had enough money to buy the house—we had to put up some \$5,000.00 difference from what was owed on it, to [173] make the arrangement. I was going to just give them a check on it. She said if I could put the \$5,000.00 in the bank she would let us move in before Christmas. Well, the bank objected to the check, because it was a personal check on the Power City Bank, and they said, "How do we know whether you have any funds there?" I said I would call the bank by telephone and, "They will tell you." They said, "No," they could not do that because I could draw it out before this check got over there.

Mrs. Hogin's husband was in Arizona at the time, and he was very skeptical about it, because they had the property sold at one time and they found out the man did not have funds; and she was still insistent upon the fact; and the only thing we

(Testimony of John Collins.)

could figure out—it was Christmas time, with the Christmas mailing rush; and I said, “If I went over and got the money would you let us move in?” She said, “I don’t care as long as you put up the \$5,000.00.” I said, “All right, I will do that.” I went and I got the money and brought it back to the bank—it came from the Power City Trust Company, \$5,000.00. As a matter of fact, I think I got a cashier’s check, or a certified check, one of the two, to make sure when we got it through their hands they knew it was good.

Mrs. Bailey said something about community [174] property, and asked me if I knew what it was all about; and she said, “If you want to put this property in your wife’s name, that is, it is her property and you have nothing to do with it, you will have to sign off these extra papers they have in the bank, or the title company,” she said, would not issue the title.

I said I did not want it to be her separate property; it came from our life savings, it belonged to all five of us, my wife and three kids. Anyway, she went ahead and my wife signed the paper and made the arrangement with the title company, they insured it on the assumption it was community property.

Well, the question came up after the escrow was over—we had moved in the house, and someone had told us, “If you live in the State of California they give you a thousand dollars’ worth of exemption in your taxes, if you are a Veteran.” And, so,

(Testimony of John Collins.)

I applied for it—my wife went down and asked about it.

They said, "You will have to bring the veteran in with you," because the house was in her name; and so we did—we went to the place and signed up. I was assuming responsibility for the tax the same as Ada. The house was put in her name for convenience of signing papers in a quick transaction, so that she could move in. They went ahead and grabbed the thousand dollar exemption, and I have been getting it all the time, [175] ever since we got the house.

The Referee: Take the witness.

Cross Examination

Q. (By Mrs. Carver): Mr. Collins, I will show you the 1953 Veteran's Exemption Application of John A. Collins, dated March 11, 1953. Does this apply to property in which you live?

A. That is true. That is the receipt they gave me.

Mrs. Carver: I offer that in evidence.

The Referee: It will be Bankrupt's Exhibit No. 4.

Q. (By Mrs. Carver): I will show you tax statement H. L. Byram, Tax Collector of Los Angeles County, covering Lot 19, Tract No. 16868. Is this the property in which you and Mrs. Collins live?

A. That is correct.

Mr. Tobin: I will object to this. The taxes can

(Testimony of John Collins.)

be paid by somebody else. It says the taxes were paid by Glendale Federal Savings and Loan Association.

Mrs. Carver: I might clarify that.

Q. Did the Glendale Savings and Loan Association carry any encumbrance on this property?

A. They did at one time.

Q. The taxes may have been paid through them. Did you pay the taxes through the Glendale Savings and [176] Loan Association?

A. That's right.

Q. This tax bill shows the property assessed to "Collins, John A. & Ada, 10423 Townley Dr., Whittier, Calif." This is the tax bill for 1952. I offer that.

The Referee: Bankrupt's Exhibit No. 5.

Q. (By Mrs. Carver): Did you at any time enter into any agreement with Mrs. Collins that the property where you now live was her separate property?

Mr. Tobin: Objected to, attempting to vary and alter the terms of a written instrument; hearsay, incompetent, irrelevant and immaterial.

The Referee: Calls for a conclusion of the witness. Objection sustained on that ground.

Mrs. Carver: Your Honor, I wonder if I may have Volume 111 of the California Appeals.

The Referee: Yes; what has that to do with the pending question?

Mrs. Carver: It shows what evidence is permissible.

(Testimony of John Collins.)

The Referee: You are asking him to tell you whether or not he entered into an agreement which says so-and-so. Perhaps you can ask him whether or not he has entered into any agreement, but you cannot ask him to testify whether or not he entered into a specific type of agreement.

Q. (By Mrs. Carver): Mr. Collins, have you [177] entered into any agreement with Mrs. Collins pertaining to this property?

A. I did not.

Mr. Tobin: Objected to, altering the terms of a written instrument by parol testimony; incompetent, irrelevant and immaterial; and not binding on the bankrupt's creditors.

The Referee: Objection overruled. Let the answer stand.

Q. (By Mrs. Carver): Did you ever intend to give Mrs. Collins this property as a gift?

A. I did not.

Mr. Tobin: The same objection; also, on the ground it calls for a self-serving declaration.

The Referee: Objection overruled. The answer may stand.

Mrs. Carver: Your Honor, I don't know whether the Court will pass on the ownership of the property.

The Referee: Yes, I will be glad to rule on the question of property as soon as all the evidence is in, because I rather think if you succeed in proving the property to be community property we have a very good chance of establishing solvency.

(Testimony of John Collins.)

Q. (By Mrs. Carver): Mr. Collins, there is a balance owing on the purchase price of the property, is there? [178]

A. There is.

Q. How much is owing, or was owing on it at the time the property was purchased?

A. I couldn't tell you exactly—at the time it was purchased?

Q. Yes. A. About \$7,900.00.

Q. It was \$8,100.00, was it not?

A. I think it was seventy-nine hundred. I paid \$100.00 down and then the \$5,000.00. Then I paid \$188.00.

The Referee: The material question is what was unpaid at the time of filing of the petition in bankruptcy?

Mrs. Carver: About \$6,000.00, I understand.

The Referee: How much was unpaid August 22, 1955?

A. (By The Witness): I would say about \$6,800.00 for a guess.

The Referee: All right; proceed.

Q. (By Mrs. Carver): Mr. Collins, you made the payments on the encumbrance on this property from the time it was originally purchased, did you?

A. Myself and my wife did.

The Referee: I think Mr. Tobin will stipulate the payments were made from community property, is that correct? [179]

Mr. Tobin: I assume so, yes.

The Referee: All right.

(Testimony of John Collins.)

Mrs. Carver: Mr. Tobin, I wonder if you will stipulate that the down payment——

Mr. Tobin: No. It was in the State of New York and there was no community property law in New York.

The Referee: All right; proceed.

Mrs. Carver: That is all I have, at present.

Examination

Q. (By Mr. Tobin): In the early part of your direct examination, Mr. Collins, you said something about telling them there at the bank that the property belonged to you, your wife and three children.

A. I would say so. Some of it is for the benefit of all five of us.

Q. Did you tell them it belonged to you and your wife and three children?

A. I just told them it belonged to my wife and I. I don't think I said about the children.

Q. Why did you mention the three children in your direct examination?

A. They have just as much right to that as they have to anything else I own, I suppose—what I meant was that they use it.

Q. You testified on direct examination this [180] property belonged to yourself, your wife and three children, did you not?

A. I believe that was the case; however, I don't recall exactly.

Q. What share, then, do you claim to own in that property that belongs to yourself, your wife and three children, in your opinion?

(Testimony of John Collins.)

A. It would be my opinion, if it was community property, the husband is manager of it, and that he has the privilege of doing what he wants to do with it—the father of a family, doesn't he?

Mr. Tobin: I am not arguing law with you. I am asking what, in your opinion, was the share of that property that you testified belongs to you, your wife and three children.

A. I would say it is all mine.

Mr. Tobin: That is all.

The Referee: Any other questions?

Examination

Q. (By Mrs. Carver): Mr. Collins, did you ever execute a quitclaim deed or any instrument conveying any interest in this property to Mrs. Collins?

A. When they asked me if it was going to be her own separate property, they told me if it was going to be that I would have to execute a quitclaim deed, or [181] else have it put on a grant deed. The one we had stated "Ada Collins, a married woman," and hers alone, separate property. I did not want it put down as hers or hers alone separate property.

Q. Did you answer the question I asked?

A. Did I sign a quitclaim deed?

Q. Yes. A. I did not.

Mrs. Carver: That is all.

Examination

Q. (By Mr. Tobin): Why did you put it in her name?

(Testimony of John Collins.)

A. Because I was not available at the time the escrow was closed.

Q. At the time the escrow was opened you intended to put it in her name?

A. Originally opened?

Q. Yes.

A. I don't believe so. That came up because I was not going to be there, I had to get the money.

Q. When did you decide to put it in your wife's name?

A. Well, I don't think I decided that question. I think it was decided between my wife and Mrs. Bailey, if I recall it.

Q. Then, you had nothing to do with the decision [182] to put it in your wife's name?

A. I wouldn't say I didn't have anything to do with it. When they talked to me about her taking care of the papers, I think the discussion came up at that time that if it was going to be her separate property, as I say, that is when it was first opened up that they would have to quitclaim it, because that was the policy of the bank, and also for the title company.

Q. You were putting up the \$5,000.00 out of your savings?

A. It belonged to my wife and I. The \$5,000.00 came out of a joint account belonging to my wife and me.

Q. It was your earnings?

A. All my life, yes.

Q. What part of it did your wife earn?

(Testimony of John Collins.)

A. Well, just because my wife is at home, taking care of the kids, I think she earns as much as I do.

Q. I am talking about the income that went into that \$5,000.00 that was back in New York, how much of that income did your wife earn?

The Referee: Did she work?

A. She did not work, no.

The Referee: That is all on that. Is there anything else?

Q. (By Mr. Tobin): Have you any reason now that [183] you can give the Court why you had that property put in your wife's name?

A. For the sake of convenience. She was there and she could go ahead and get the escrow started and complete it so that we could move in before Christmas, 1951.

Q. Convenience in what respect?

A. To make the necessary arrangements so that we could move in.

Q. Why did you go back to New York? Did you fly?

A. I believe I did.

Q. About how long were you gone?

A. About two or three days.

Q. When was the deed made out with reference to your arrival back in Los Angeles?

A. I could not tell the exact date. It should be on the deed.

Q. When did you get back to Los Angeles?

A. I could not tell you. As a matter of fact,

(Testimony of John Collins.)

I could not tell you what date the house was bought, but I know it was right around Christmas.

Q. Acknowledgment was on December 7, 1951.

A. December 7th or 17?

Q. The 7th. It was recorded December 18, 1951.

When with reference to December 7, 1951, did you get back to Los Angeles? [184]

A. I really couldn't tell you.

Q. Was it before?

A. I doubt if it was before. I remember it was close to Christmas.

Q. You cannot tell us that—how long before this deed was made out to your wife that you got back to Los Angeles with the \$5,000.00 of your savings that went into it?

A. I imagine it was made out while it was over there, I don't know.

Q. Then you had nothing to do with putting the property in your wife's name? You were in New York?

A. I could not say, to be perfectly honest.

Q. Were you in New York when this deed was made out, December 7th, in favor of Ada J. Collins?

A. To be honest with you, I can't tell you.

Q. You can't tell us?

A. Well, that is four years ago. I do know it was before Christmas, and I thought the date was later than that.

Q. You cannot tell us what convenience was to be served in putting it in her name, can you?

A. Yes, it was the idea she could take care of

(Testimony of John Collins.)

all the paper work. There were various things necessary for us to have to live, such as a stove, and various things like that, that we had to buy, which we took care of. [185]

Q. What difference would that make, whether the title was in her name or your name or whether there was a stove in the house?

A. While I was doing one thing she was doing another.

Q. What were you doing and what was she doing? I want to get as much detail as I can.

A. I would like to give you more detail, or whatever is necessary to bring forth this matter, but I really can't tell you.

Q. But you cannot do it?

A. Not the exact date, I don't believe I could.

Q. You cannot tell us what convenience was to be served? A. Yes, I told you.

Q. What paper work was she doing?

A. The whole file that the Bank of America has, and there was one paper put into evidence, and I believe there was fifteen or twenty more up there.

Q. That was dated, I believe, December 17th.

The Referee: The escrow is dated December 7th.

Mr. Tobin: That is the same day as the deed, December 7, 1951. The deed was recorded December 18, 1951.

Q. What paper work did your wife do that would suit your mutual convenience to have the title taken in her name? [186]

A. She must have had to sign these escrow

(Testimony of John Collins.)

papers, or whatever was necessary to make the transaction.

Q. Were you there when the escrow papers were signed, the trustee's exhibit, is it?

The Referee: Petitioning Creditors' Exhibit No. 8.

A. May I look at it?

Q. (By Mr. Tobin): Were you there when those escrow instructions were signed?

A. It is just on this one sheet. This here says December 7th.

Q. Were you there when that was signed?

A. I don't believe I was.

Q. Where were you?

A. I really couldn't say.

Q. In New York?

A. I imagine I was. I really couldn't tell you.

Q. Then, you had nothing to do with the taking of that title in your wife's name, did you? The escrow statement was signed the 7th of December. The deed was made out and signed and acknowledged the 7th of December. You think you were in New York at that time?

A. Well, if you might allow me to look I think maybe I could pinpoint the date I went.

The Referee: We will take a recess.

(Whereupon, a short recess was taken, after which [187] the following proceedings occurred.)

Q. (By Mr. Tobin): Mr. Collins, when did you come out here from Niagara Falls?

(Testimony of John Collins.)

A. I would say it was approximately in October, 1951.

Q. Did you owe any creditors back there at that time?

Mrs. Carver: I don't see that that has any bearing on this matter.

Mr. Tobin: On the question of the reason and convenience, and so forth.

The Referee: Objection overruled.

A. I had \$20,000.00 in the bank; I didn't owe nobody.

Q. Were you having any trouble with the United States Government on income tax at that time?

A. No, sir.

Q. Had you had any trouble with the United States Government on income tax? A. No.

Q. Never? A. No, we never disagreed.

Q. You had no claim made against you by the government on a shortage of income tax or anything like that? A. No, sir. [188]

Q. Well, now, during the recess, have you found out what the convenience was that would be suggested by your taking this property in your wife's name?

A. The convenience was that my wife could complete the transaction while I was not available.

The Referee: That has been said several times. You were going to try to find something as to when you went to New York.

A. (By The Witness): Well, it was after I put this deposit on the house of \$100.00.

(Testimony of John Collins.)

Q. (By The Referee): When did you go to New York?

A. If the Court please, I would like to say it was between the 6th of December and the 12th of December. That is about as close as I can get to it.

The Referee: All right, proceed.

Q. (By Mr. Tobin): Did you owe any money back in the east, east of the Mississippi River, to relatives or anybody else? A. No.

Q. Did you in 1951?

A. No. I think I owed a lawyer \$33.00, but he got it paid.

Mr. Tobin: That is all.

The Referee: Any other questions?

Mrs. Carver: No, your Honor.

The Referee: Step down.

(Witness excused.) [189]

The Referee: Any other questions?

Mrs. Carver: No further questions pertaining to the home, please.

The Referee: Is all the evidence in? Is there any question on either side?

Mr. Tobin: That is all.

The Referee: All right.

(Discussion.)

The Referee: Is there anything further?

Mrs. Carver: Except to state, your Honor, that it may be that we will want to bring Mrs. Collins in.

The Referee: We might assume that Mrs. Collins would corroborate the testimony of Mr. Collins, the reasons given by Mr. Collins for taking title in the

name of his wife, of course, is not very compelling for the reason that the record very clearly shows that the escrow was entered into on December 7th; and that the escrow instructions were, in the first instance, signed by Mrs. Collins; that the escrow instructions provide for the payment of \$100.00 in the escrow; and that when papers were ready to file there would be handed to the escrow the further sum of \$5,054.56; and, so, I think that what happened at the escrow was that there was this discussion of moving in before the escrow was completed; and in order to accomplish that Mr. Collins went to New York and got the \$5,000.00; but the signing of the [190] papers was done at that time, and everything was done that would have to be done by Mrs. Collins. Is there anything further?

(No response.)

The Referee: The Court concludes that the evidence here presented is not sufficient to overcome the presumption of separate property. You may proceed.

JOHN COLLINS

resumed the stand and testified further as follows:

Q. (By Mrs. Carver): When did you first become connected with Mr. Lefringhouse?

A. About 1952, late in 1952.

Q. At that time did you have negotiations with him about going into the business? A. I did.

Q. Would you state to the Court what was agreed between you and Mr. Lefringhouse at that time?

Mr. Tobin: Was that in writing?

(Testimony of John Collins.)

Q. (By Mrs. Carver): Did you have any agreement in writing with Mr. Lefringhouse?

A. No, I wouldn't say we did, especially, other than the money I gave him, and checks and stuff like that.

Q. What was the arrangement when you first became associated with him? [191]

A. Mr. Lefringhouse had just started recently, had started a liquor store in 1952; and he was telling me how he wanted to take the liquor store and operate it successfully, and he at the time had too many payments on it, of \$600.00 a month, when he first opened; and he needed some money to keep that going, and so forth. And he said he would also like to start a cocktail bar where the beer bar was. And he wanted to know if he could borrow some money. After various times talking back and forth, why, he said—we got talking about security and so forth; and he wanted money right away so that he could use it in the liquor store; and, also, to go ahead and make preparations in the event we were successful in obtaining a liquor license. At that time I made the agreement with Mr. Lefringhouse—there were some old fixtures at the beer bar there—that if I gave Mr. Lefringhouse \$3,500.00—which I did—that that would pay for what remaining fixtures could be of use. There were a lot of fixtures that were no good and had to be thrown away; and started remodeling, which we started in 1953.

(Testimony of John Collins.)

Now, we got talking about it and I said, "How are we going to handle it?"

He said, "I can't give you any title to the fixtures because there is a chattel mortgage." This was a few days after he got the \$3,500.00 to use [192] in the liquor store. I said, "Why don't you get the chattel mortgage off it?" He said, "It is not paid out." And, so, one thing led to another, but he said, later on, he would get the chattel mortgage released.

The Referee: Don't go too fast. Let us see if we can follow you. This began when?

A. The first happened around 1952, late in the year, December.

Q. When did you give him the \$3,500.00?

A. I believe it was pretty near, I am sure, December or January.

Q. December, 1952? A. 1952, yes.

Q. Is there any way you can prove it?

A. A check.

Q. Have you got the check?

A. I think there are some checks there.

Mrs. Carver: I have the check.

Mr. Tobin: May I see the rest of them?

Mrs. Carver: I have a portion of the checks.

Examination

Q. (By Mrs. Carver): Mr. Collins, I will show you check 28, December 24, 1952, payable to Stanley Lefringhouse, in the sum of \$1,000.00, signed by Ada J. Collins. Was this check delivered to Mr. Lefringhouse? A. Yes, it was. [193]

(Testimony of John Collins.)

Q. Is that one of the checks you have referred to?

A. That's right.

Mrs. Carver: May I hand this to the Court?

Mr. Tobin: Objected to, incompetent, irrelevant and immaterial. It appears to be the check of Ada J. Collins and not the bankrupt.

The Referee: Mr. Tobin, I imagine there are a lot of married women who sign their husbands' checks. Objection overruled. It will be Bankrupt's Exhibit No. 6.

Q. (By Mrs. Carver): On or about December, 1953, did you give to Mr. Lefringhouse any other money, by check or cash?

A. Another check for \$2,500.00.

Q. Do you have that check?

A. Well, in December, 1952, I had withdrawn from another account \$3,500.00, and put it in the bank, I believe, and on depositing these funds it made a gross amount in the bank of about \$3,800.00. At the cashing of this \$1,000.00 check, Mr. Lefringhouse went down to cash it, and the man at the bank said the \$3500 check from New York had not cleared and he did not like the idea of cashing this one for \$1,000.00; but after I talked with him he said, "I will simply take a chance and cash it."

A few days later I gave him a check for \$2,500.00. Mr. Lefringhouse then went to the bank and asked [194] him to cash it, and the man said that the \$3,500.00 check had not cleared at that bank.

Q. (By The Referee): Was the \$2,500.00 check cashed by Mr. Lefringhouse?

(Testimony of John Collins.)

A. I don't believe so.

Q. As a matter of fact, you know it was not, don't you, is that correct?

A. I really don't know. I have a deduction on my account for \$2,500.00, and either cashed that check, or I withdrew \$2,500.00 out of the account, because on the bank statement there was a withdrawal of \$2,500.00, which I gave Stan Lefringhouse.

Q. Would you say you gave it to him in the form of a check or in cash?

A. I am quite positive I gave it to him in cash. The \$2,500.00, I gave him a check first, and they would not take the check.

Q. When did you give him the check?

A. About three days after that one. If that is the 24th, I would say about the 27th of December.

Q. When did you give him the cash for \$2,500.00, if you did?

A. I would say the 31st of December, or maybe the 1st of January, as soon as the \$3,500.00 check was cleared in New York as being okay with the Bank of America.

Q. What business did Mr. Lefringhouse operate [195] in these premises at that time?

A. A beer bar.

Q. Did he have a liquor store?

A. In the front part of the building, yes, it was separate.

Q. You are referring to December, 1954?

A. That is true.

(Testimony of John Collins.)

Q. He had the liquor store all the way through?

A. That is true.

Q. And did you ever acquire any interest in the liquor store? A. No.

Q. He was operating a beer bar, is that right?

A. Yes.

Q. What was your agreement with Mr. Lefringhouse?

A. That I was going to supply the money for the remodeling, and all that stuff; and at a future date that Lefringhouse wanted to buy the place back from me. I was willing to let him have it back, or the money I put in, altogether, because I put more money in after that.

Q. Your agreement was that Lefringhouse was selling the beer bar to you, is that right?

A. That is right.

Q. For what price? [196]

A. Well, we went over the fixtures, and I couldn't tell you the exact price, and what fixtures were to be taken out of the bar, I don't remember how much it was, but that \$3,500.00 was to cover the present fixtures that were in there, and for the remodeling of the bar.

Q. At that time Lefringhouse was operating the beer bar, is that right? A. Yes.

Q. Did the operation at any time stop?

A. The operation stopped, I believe, along about May, 1953.

Q. Between December, 1952, and the time when

(Testimony of John Collins.)

you put your liquor license in, which Lefringhouse, I think said was in June, 1953?

A. It reopened again in May or June, yes.

Q. What do you mean? Had it ever been closed?

A. Yes, it was closed for remodeling.

Q. During what period was it closed for remodeling?

A. I would say for about eight weeks, in April and May.

Q. Between December, 1952, when you gave the \$3,500.00, and April, 1953, who owned the beer bar?

A. Stan Lefringhouse continued to operate it as a beer bar until we seen it was permissive to get a license in the place. [197]

Q. You had no interest in the beer bar in that period of time, from the time you gave the \$3,500.00 until you closed it, or it was closed for remodeling?

A. As soon as we got the liquor license and were sure it was going to go all right, then we arranged we would close down pretty quick, and as soon as we got the stuff arranged and the remodeling done.

Q. Then do I understand that the original agreement contemplated the securing of the liquor license?

A. That's right.

Q. And you really were not going to be in the place until you had revamped it into a cocktail bar, is that right?

A. That is true.

Q. Did you put in any more money than the \$3,500.00?

A. Yes.

Q. What did you put in?

(Testimony of John Collins.)

A. I don't remember, but there are checks.

(Mrs. Carver hands checks to Mr. Tobin.)

Mr. Tobin: How many checks of April 13th do you have?

Mrs. Carver: That is all.

Mr. Tobin: One is for \$264.00 and one is for \$250.00.

Q. (By Mrs. Carver): Mr. Collins, I will show you [198] a check——

The Referee: I think it is stipulated that the checks were delivered, is it not?

Mr. Tobin: Yes, your Honor.

The Referee: All right, the check of April 13, 1953, for \$250.00 and the check of April 13th, for \$264.00, each payable to Stanley Lefringhouse, will be Bankrupt's Exhibit No. 7.

Did you put in any more money?

A. Yes. The date, if your Honor please, on the two checks, it was April 13th, both of them.

The Referee: That is right.

A. A day or two previous to that Mr. Lefringhouse and I were going—I had given him cash money for about \$100.00-odd—now, the night I went down, that very day, April 13th, I went down to the bar and saw a fellow working there, and I says, "What is the matter?" He says, "We are not going at all." I says, "What is the trouble?" He says, "Run out of funds."

Mr. Lefringhouse came in a few minutes later, and we talked the situation over, and he said he needed money to go ahead—what we had figured, it was going to run more money; and that night,

(Testimony of John Collins.)

in the liquor store, I gave him as much cash as I had in my pocket, and he had owed me \$20.00—we were out together a day or two before that—and altogether, with those checks, [199] totaling \$1,000.00.

Q. What was the purpose of giving him the check for \$264.00, do you know?

A. Well, it was to make up the full amount, and he wanted to use the money immediately.

Q. To make up what full amount?

A. Of \$1,000.00, to make a total of \$1,000.00.

Q. April 13, 1952, is the day you gave these checks, was the place closed? A. Yes.

Q. The remodeling was underway, is that correct? A. Yes.

Q. Your testimony now is that these two checks and cash given at or about the same time totaled \$1,000.00? A. And cash at the same time, yes.

Q. On the back of the \$264.00 check are some figures, reading \$264.00, \$40.00, \$304.00. Does that refresh your recollection about any part of the transaction?

A. Well, it seems to me that the \$40.00, apparently, was the night that Stan and I were at the Turf Club for a time and I gave him money.

Q. Did you give him further money? You have testified about \$3,500.00 and \$1,000.00. Did you give him any other money?

A. Directly to him, for the business I did, [200] yes.

Q. What did you give him?

(Testimony of John Collins.)

A. There was various checks for the State Board of Equalization, for taxes and things of that nature.

Q. Let us get down to the liquor license. Was that a new license you secured the 1st of June, let us say, 1953, had you a license up to that time?

A. No.

Q. That was the first time a license was issued to you? A. That's right.

Q. Did that cost you any money?

A. \$325.00.

Q. Now, have you any evidence as to any other moneys which you paid to Mr. Lefringhouse or which happened in connection with this business—any evidence and not merely your recollection?

A. Checks?

Q. Yes.

A. Check to the State Board of Equalization. I believe Mr. Lefringhouse has those.

Mrs. Carver: Here is another check. I will show it to Mr. Tobin.

A. I did give more checks.

Mrs. Carver: I do not have any more. You might look through your papers. [201]

The Referee: You have no other checks?

A. (By The Witness): I have them, but I don't have any here, that I can recall right offhand. Here is one for \$17.15, to the State Board of Equalization. This here check that I lost came out of the checkbook, down at the place—it was the Norwalk Branch, and they crossed it out and put in the Whittier Branch.

(Testimony of John Collins.)

Q. Do you know what this was for?

A. I believe it was to pay some taxes. I don't recall exactly what it was for, no; it was something to do with the place.

Q. On the beer bar, is that it? A. Yes.

The Referee: Do you want to offer this?

Mrs. Carver: Yes, your Honor. I might show it to Mr. Tobin.

A. (By The Witness): Here is another, \$151.00 to the State Board of Equalization.

Mrs. Carver: I will offer these.

The Referee: These two checks, one dated December 30, 1952, \$151.00, and the other one dated April 30, 1953, \$17.15, will be Bankrupt's No. 8.

You were in the Schooner, were you not, or whatever it was called? A. At that time?

Q. Yes, December 30, 1952. [202]

A. I also owned the Schooner.

Q. How do you know that this check of December 30, 1952, has any relationship to the property in which Mr. Lefringhouse was interested? How can you identify it?

A. Well, for one thing, this check for \$151.00, that is a deposit for the sales tax.

Q. A deposit for sales tax?

A. Yes, you have to put up a deposit.

Q. How do you identify it as being a deposit for sales tax?

A. I could get someone from the State Board to say I paid it on that date.

(Testimony of John Collins.)

Q. All right. Now, have you any evidence as to any further money paid?

A. I can't think of any. I didn't think we were going into that and I didn't go through the stuff I have.

Q. What did you say your agreement was with Mr. Lefringhouse as to what you were getting for your money?

A. Well, the arrangement was that Lefringhouse was going to manage the bar, the cocktail, when it was set and ready to go.

Q. Were you to acquire any property with your money? [203]

A. I was supposed to supply the fixtures, the whiskey; and Stan was supposed to supply the efforts and the managing part of it, to put this stuff together. What he was getting back, he was going to buy the bar back for the amount of money—I was really doing him a favor, to help him get started.

Q. And you were supposed to have the right to get the money you had put in for the fixtures?

A. Any materials I put in.

Q. At your cost?

A. All at my cost. He didn't have any money to buy things. With the operation that was going, he was to operate it. I was to get the first \$250.00 a month out of the profits.

Q. You are going too fast. Well, was there anything said as to who owned the fixtures until such

(Testimony of John Collins.)

time as Mr. Lefringhouse would give you your money back?

A. Nothing other than that the man took the money.

Q. No; you always want to explain everything. The question is, was there anything said as to who owned the fixtures after you gave him your money? You did not make out any papers?

A. No, we did not make out any bill of sale.

Q. When you got down to it, when it was remodeled and opened up again, you had your liquor [204] license. What was Lefringhouse to get out of the operation?

A. Everything over the first \$250.00 a month of profits.

Q. What was said about the rent?

A. It was to come out of the cost of operation of the bar, which is in those books.

Q. You did have some understanding with him about the rent, didn't you? A. We did.

Q. And you had agreed with him that you would pay, or someone would pay, \$225.00 a month, is that right?

A. That was the original—that was the agreement earlier. Then we changed that one, when I went ahead and put the additional money in.

Q. Let us get back to the \$225.00 deal. When was that made?

A. When you go down to the Board you simply state you have a lease in order to make an application for the license.

(Testimony of John Collins.)

Q. That is when you started to get the liquor license? A. Yes.

Q. How long did it take you to get the liquor license?

A. Three months, I would say three or four months. [205]

Q. They said you had to have a lease?

A. That's right.

Q. Did you get a lease?

A. Well, I told him that if I would lease the building just the way it was—\$225.00 a month.

Q. What building? A. The bar section.

Q. Did you get the lease from Lefringhouse?

A. Yes.

Q. In writing? A. Yes, I did.

Q. Where is it?

A. I turned it in to the State Board of Equalization.

Q. You didn't keep a copy?

A. It was only a little longhand writing.

Q. And you and Lefringhouse signed it?

A. That is true.

Q. \$225.00 a month you were going to pay to Lefringhouse, is that right?

A. That is correct.

Q. You turned that in before you got the license?

A. Then he was going to supply the fixtures at the \$225.00 rate.

Q. Well, now, was the \$225.00 deal arranged before you gave him the \$3,500.00? [206]

(Testimony of John Collins.)

A. No.

Q. I thought you were going to pay for the fixtures by giving him the \$3,500.00.

A. That was at that time. Then we talked about that I just go ahead and buy the fixtures and put them in, and then, "We will charge \$225.00 a month for the place," a higher rent, and he would supply the fixtures. He could not because he did not have the money to do it and he owed me.

Q. What did he say about the money you put up, the \$3,500.00?

A. I wondered that myself.

Q. What did he say?

A. He said, "I have not got it now but you will get it."

Q. When did you turn in this lease to the State Board?

A. The day I applied for a liquor license.

Q. No, you are getting mixed up. You said you applied for the liquor license and then you said they would not give it to you unless you had a lease?

A. They did within a day or two of January 6th.

Q. How long before you got the license did you turn the lease in?

A. Well, at the time of the application I turned the lease in, before I even got the license. [207]

Q. How long before you got the license did you turn the lease in?

A. I would say two or three months.

(Testimony of John Collins.)

Q. Now, did you pay Lefringhouse any money on the lease?

A. No, it was not to be effective until the bar was set up.

Q. You didn't pay him any money?

A. No.

Q. You have been in court, have you not?

A. Yes.

Q. Did you hear him testify that you gave him \$450.00?

A. I know what he said.

Q. But you say he did not?

A. Not that I know of. I didn't know about it. He said he did not receive any money promptly.

Q. What was he to get for operating the business? You said everything over \$250.00 a month.

A. He was supposed to get.

Q. I take it you never got the \$250.00 a month?

A. The idea was that I was supposed to supply the fixtures.

Q. Just answer the question. Did you ever get your \$250.00 a month or any other sum from the operation? [208]

A. No.

Q. Did you ever ask him for it?

A. I did. He said, "Now, you are supposed to supply the fixtures, and we have got to pay this and that"—and they are all listed in the books.

Q. In other words, the \$250.00 was supposed to go into the fixtures?

A. Sure, to be paying off the fixtures.

Q. Those fixtures were mortgaged, were they not?

A. The original fixtures were chattel mortgaged.

(Testimony of John Collins.)

Q. How did he get rid of the mortgage, if he did?

A. He didn't do it until I did it. I got the release of the chattel mortgage some place here. I think it is right here.

Q. Show it to Mrs. Carver.

A. What date is that?

Mrs. Carver: July, 1954.

A. That is when it was finally released.

The Referee: Are you offering it in evidence?

Mrs. Carver: Yes, your Honor.

The Referee: This will be Bankrupt's Exhibit No. 9. This is dated July 27, 1954.

How much money did you pay in connection with this release? [209] A. Did I pay?

Q. Yes.

A. He was the one that borrowed the money.

Q. Just don't discuss matters with me. If you paid anything, say so, or if not, say "nothing."

A. Nothing.

Q. Who gave you this paper?

A. A man by the name of Emmett Rogers, he and his attorney.

Q. Was Mr. Lefringhouse with you?

A. I don't think so, but he may have been. He had called Mr. Rogers on the phone.

Q. You paid no money, however, to get this?

A. No.

Q. Now, Mr. Lefringhouse made out a note to your brother and you signed it, is that right?

A. That is true.

(Testimony of John Collins.)

Q. And he, of course, did. Do you know the date?

A. It is July 6, 1954, I think. I think Miss Hofstetter has a copy.

The Referee: Is there anything available on it?

Mrs. Carver: I have it right here. I will offer it.

The Referee: Bankrupt's Exhibit No. 10.

This is a note dated July 6, 1954, payable to [210] Lawrence Collins, for \$4,100.00, payable in certain installments. Did Mr. Lefringhouse owe your brother any money at this time?

A. He owed him for some fixtures, or something else, I believe, that he had in the liquor store—a refrigerator was one, a cash register.

The Referee: We will have to identify that. Was that something he got from your brother before you got in the deal with him or after?

A. I believe it was before we opened the cocktail bar, but I am not positive.

Q. Did it amount to as much as \$4,100.00?

A. It amounted to, I think, \$600.00 — they agreed on.

Q. What did Mr. Lefringhouse get for the remaining \$3,500.00?

A. Well, at the time, now, 1954, Mr. Lichtenfeld, the man that was here a few days ago, he was going to buy the place. At the time he was going to buy the place that chattel mortgage was in existence that I pointed out to you—that went into the Vista Escrow, at Long Beach, an escrow was opened.

(Testimony of John Collins.)

Q. We understand there was a \$3,000.00 escrow.

A. Yes.

Q. I am asking you what Lefringhouse got for this \$3,500.00. Just tell me that. [211]

A. He was to get one-half of the bar, starting as of May 11, 1954.

Q. This was for a half-interest in the bar, is that right? A. That's right.

Q. Including the license?

A. Including everything, everything that was there at the bar, excepting that he was to account for the \$1,800.00 of that whiskey that Harry paid him.

Q. Who is Harry? A. Harry Lichtenfeld.

Q. This is a little inconsistent, isn't it? I thought you testified you owned the bar fixtures at this time. A. That's right.

Q. But apparently you sold a half-interest to Lefringhouse? A. On May 11, 1954.

Q. How can you own them if you sold a half-interest to Lefringhouse?

A. Well, Lefringhouse claims that this thing never went through, this corporation thing. That was always the understanding—if we were not a corporation we must have been partners. He got the money and everything out in the place.

Q. Your brother is now suing Lefringhouse on [212] this note? A. Yes.

Q. And I assume suing you also?

A. That is true.

The Referee: All right. I will take an adjourn-

ment at this time and we will resume tomorrow morning at ten o'clock.

(Whereupon, an adjournment was taken until Tuesday, December 6, 1955, at 10:00 o'clock a.m.) [213]

Tuesday, December 6, 1955, 10:00 O'Clock A.M.

JOHN COLLINS

resumed the stand and testified further as follows:

Examination

Q. (By Mrs. Carver): I will show you a list of fixtures in the place of business of Stan's Stagecoach Bar. Can you tell us which fixtures were purchased after you became associated with Mr. Lefringhouse? A. Afterwards?

Q. Yes.

A. Well, the stoves were refinished.

Mr. Tobin: Objected to. He was asked what ones he had purchased.

The Referee: Objection overruled.

A. They were re-done over; the booths—it says two boxes here—I believe that means the beer box—I believe there was one there at the time. The storeroom was put on. The jockey box was put in. The rest rooms were remodeled at the time. Partitions were put up at the time. This here, papering and painting, was done at the time. The dance floor was put in at the time. The lighting, the piano bar, the asphalt tile—I would like to say it was all [214] done after I went into the bar with Lefringhouse.

(Testimony of John Collins.)

Q. Are these the items that were to be paid for and Mr. Lefringhouse notified you were paid for by the application of \$250.00 a month?

A. That is true, some of them.

Q. You testified yesterday as to payment made to Mr. Lefringhouse when you first became associated with him. I don't think it was clear just what you were to get for that payment. Will you state what your understanding was?

The Referee: I think he has testified that he was to put in the money and Lefringhouse was to put in his effort; that he was to get the first \$250.00 from the income, and Lefringhouse the balance. And I think he testified, in substance, they were to be equal partners in the physical assets. Is that right?

A. No; we would become as of May 11, 1954, that is, after the bar was re-taken from Lichtenfeld.

Q. Get away from that, at the outset, before you sold to Lichtenfeld.

A. We were not to be partners.

Q. What interest were you to have in the physical assets, including the license?

A. Own them.

Q. And he was to have the right to buy back?

A. Yes. [215]

Q. After you got it back from Lichtenfeld then was it the understanding that from that time you were equal partners?

A. That was our verbal arrangement.

(Testimony of John Collins.)

Q. What about the arrangement as to the payment to you of the first \$250.00? Was that still in effect? A. At May 11th?

Q. Yes.

A. No, I was no longer to receive \$250.00.

Q. You were to share the profits equally?

A. Yes.

Q. What about the rent?

A. That was an expense to come out of the bar.

Q. At what rate?

A. At that particular time it was \$75.00.

Q. You agreed upon \$75.00?

A. That was one-half of the total of the entire building. I perhaps got mixed up yesterday on the \$4,100.00 note that we talked about. If I could have the escrow papers from the Vista, a moment. The bar was sold for \$16,000.00 to Lichtenfeld. Of that \$16,000.00 the real estate man was to get \$1,600.00, which left a balance of \$14,400.00. At that time there was an indebtedness of the bar to the extent of \$7,500.00. The balance between the \$7,500.00 and the \$14,400.00, which would be about \$6,900.00, I was to get. I will show you in the escrow where [216] I was to get of that balance at the time an equity of \$5,500.00, according to the moneys put in, and so forth. Lefringhouse had an equity of approximately fourteen in it, which he claimed he should get out of it. All I was interested in was to get my own money out.

Mrs. Carver: I believe the escrow papers are in evidence.

(Testimony of John Collins.)

The Referee: They are not in evidence. I do not find them.

Mr. Tobin: What was Petitioning Creditors' No. 6?

The Referee: Petitioning Creditors' No. 6 is a demand by Lefringhouse and Collins on Juanita F. Lichtenfeld and/or Juli, Inc., a California corporation, that they pay certain moneys.

Mr. Tobin: I have a copy of the escrow here.

Mrs. Carver: Is the one you have the same as this one?

Mr. Tobin: It is the same one, yes.

Mrs. Carver: I want to offer this as the Alleged Bankrupt's next in order.

The Referee: Bankrupt's Exhibit No. 11. Proceed.

A. On that sheet I refer to an agreement, that I was to receive \$5,500.00 from the escrow—on the top there, I believe; and on the top of that, with Lefringhouse having a \$1,400.00 equity, and I having a \$5,500.00 equity—it was agreed upon between [217] the two of us.

Mr. Tobin: Now we will certainly object to an alteration.

The Referee: Objection sustained. Proceed with the questioning, Mrs. Carver.

Mrs. Carver: May I have the escrow instructions?

The Referee: There is no use asking what is in the escrow instructions.

Q. (By Mrs. Carver): Did Mr. Lefringhouse

(Testimony of John Collins.)

ever account to you for any profits or losses during the operation of this business?

A. I wouldn't say he never did, but when it came down to such things as this \$1,800.00 of Lichtenfeld, wherein he paid for the whiskey and bar, Lefringhouse was supposed to account for that \$1,800.00, which he has never done; and that \$1,800.00 worth of whiskey that the petitioning creditors on this bankruptcy have put into here—that same whiskey.

Mr. Tobin: I move to strike, not responsive.

The Referee: The last part, relating to the petitioning creditors, will go out.

Q. (By Mrs. Carver): Was there anything ever paid to you from the operation of the cocktail bar?

Mr. Tobin: Objected to, immaterial.

The Referee: Objection overruled.

A. No. Any profits, you mean, or anything like that? [218]

Q. Anything. A. No.

Q. Coming down to August, 1954, did you and Mr. Lefringhouse enter into any other agreement in reference to the fixtures in the place of business?

A. Well, on this \$4,100.00 note, we were going to put a chattel mortgage on the fixtures in the bar; and the reason it was held up until August was because of the release of the other chattel mortgage of Rogers, in the file.

Q. What was the arrangement as to any interest in the business between you and Mr. Lefringhouse?

Mr. Tobin: That would be objectionable.

(Testimony of John Collins.)

The Referee: That has been testified. Proceed to something else.

Mrs. Carver: Your Honor, at this time I have figured the various cash surrender values of the insurance policies.

The Referee: Have you made a statement of that?

Mrs. Carver: Yes.

The Referee: Let us not take the time to go over that now. If there is no objection this will be marked Bankrupt's Exhibit No. 12, subject to inspection and check by counsel for the petitioning creditors.

Mrs. Carver: Likewise, the hospital benefit [219] insurance, showing there was hospital benefits to the extent of \$1,800.00, which will be paid in the event the Industrial Accident claim is denied. I won't offer the policy itself.

The Referee: Very well.

Mrs. Carver: I will get it later on.

Q. (By Mrs. Carver): Mr. Collins, in reference to the accounts receivable of your former place of business, the list we have put in evidence, what was the agreement between you and your former partner as to the ownership of that particular list of accounts?

A. There was about four sheets of accounts receivable. At the time we went into escrow we flipped a coin, or took choices back and forth, of which account we would accept, which one we thought we

(Testimony of John Collins.)

could collect; and he took one-half and I took one-half.

Q. Mr. Collins, I will show you a list of the accounts receivable, which you just testified to. Now, these accounts total \$1,361.25. In addition to this list of accounts what other accounts receivable do you have? A. The moneys owed to me?

Q. Yes.

A. Well, there was a judgment against a George Graham. That is not on here. It was about \$60.00 or \$70.00. There was an indebtedness from a Joseph Kaiser for \$960.00. [220]

Q. What does the Joseph Kaiser cover?

A. It was a loan.

Q. When did you make the loan to him?

A. In June, I believe, 1954.

Q. What is the financial condition of Mr. Kaiser at this time?

Mr. Tobin: Objected to, calling for a conclusion of the witness.

The Referee: Objection sustained.

Q. (By Mrs. Carver): This indebtedness was for what, this \$960.00?

A. Well, the arrangement was, he was to move out here, as I was foreman for the steam fitters—I told him if he would come out I would get him a job. He did not come out right away because he had a store to sell back there.

The Referee: Don't go into all those details. All we are interested in is the fact, whether Mr. Kaiser is indebted to you.

(Testimony of John Collins.)

Q. (By Mrs. Carver): Do you have any documentary evidence?

A. Nothing I can think of.

Q. Do you have a cancelled check?

A. I don't know whether he paid me by check or not. It seems to me I gave it to him in cash.

Q. What records of the loan do you have? [221]

A. Just that I know I paid for his car—that was what it was for.

Q. In other words, you advanced the money to buy him an automobile?

A. No, he had the automobile and he wanted to buy a house, and he was only making \$80.00 a week and he could not afford to pay both. I loaned him the money to make payment on the car; and when he went to work he was going to repay me the money.

Q. (By the Referee): Did you have a conversation with him about \$900.00? A. Yes.

Q. Was there anybody else present?

A. The day I gave it to him?

Q. Whenever you had a conversation?

A. I believe my wife was.

Q. Do you know where it was?

A. The first day we talked about it was over at my house. I said, "Joe," he was paying \$125.00 rent——

Q. I am sorry. Will you be kind enough to relate the conversation?

A. This was what I told him: "why don't you get out of this here big obligation of \$125.00 a

(Testimony of John Collins.)

month rent, buy yourself a house, where you can make lesser payments?" He said he couldn't because he had a car payment, and with the small amount of money he was making as a clerk in a [222] grocery store, he couldn't; and he said, "I would like to buy a house"; but this house he wanted to buy, he didn't have enough money if he paid for the car, he wouldn't have enough money to pay down on a house. I told him, "It won't be long until you will be going to work for me, if you want, I will loan you some money."

He said, "If I can pay off my car, that would leave those payments to go for the house." Then, when I got him a job, I figured he would get \$150.00 a week and he could make both payments.

Q. We have taken a long time in this case and we have got to get down to the bar. What was said about you giving him \$900.00, or making a gift of it to him, what he said?

A. He said he would pay back to me when he makes the money on the other job.

Q. Did you give him \$900.00?

A. I gave him \$960.00.

Q. Was it in check or cash?

A. I believe in cash.

Q. Where did you get the cash?

A. At home.

Q. You mean you had the money in your home?

A. Yes.

Q. You didn't draw it out of a bank?

A. I don't believe I did. [223]

(Testimony of John Collins.)

Q. Did you get any kind of receipt for it?

A. No.

Q. Did you pay the money to Mr. Kaiser or did you pay it to the person or firm that had the loan on his car? A. Mr. Kaiser.

Q. Do you know what he did with it?

A. He said he was going to pay off the mortgage on his car.

Q. Did he ever get any paper on the car?

A. He showed me where he owned the car.

Q. Did you get any paper on the car?

A. No.

Q. Were you named as legal owner on the car?

A. No.

Q. In place of the finance company?

A. No, I was not financing him.

Q. Has he ever paid you anything? A. No.

Q. Have you ever asked for anything?

A. The agreement was——

Q. Have you ever asked for anything?

A. No.

Q. Where is Mr. Kaiser now?

A. He is in either Covina or West Covina.

Q. Where does he work? [224]

A. He works at a market, a Basket Food Store.

Q. (By Mrs. Carver): In connection with the injury to your son, what bills have you actually paid? A. I paid the hospital bill.

Q. What was the amount of that?

A. I couldn't tell you right offhand.

The Referee: Haven't we gone over that?

(Testimony of John Collins.)

Q. (By Mrs. Carver): I will show you here certain records. One is called "Hugette"; in your opinion is this record a collector's item?

A. I really don't know, to be honest.

Q. I will show you also a record by Ernestine Schumann-Heineck. What, in your opinion, is the value of this record?

A. It could be—up to \$50.00.

Q. Is it your opinion the record has a value of \$50.00?

A. I believe it could possibly have, yes.

Q. I will show you an album of thirteen records, called the Catholic Church Record Club. What, in your opinion, is the value of this particular album of records?

A. I would not take \$100.00 for it. I believe that it would now be worth more than that.

Q. Can you give a value?

A. Well, I would set it at \$100.00.

Mrs. Carver: I think we are down to the claim [225] of the Industrial Accident.

The Referee: We will hold that. That is set for hearing tomorrow, is that right?

A. (By the Witness): It is supposed to be.

The Referee: We will hold that. Go ahead.

Mrs. Carver: At this time I am not mindful of anything. I was going to ask leave that if there are any other assets that we be given an opportunity to prove them and prove their value.

The Referee: All right. You may rest without prejudice. Do you rest?

(Testimony of John Collins.)

Mrs. Carver: Yes.

Cross Examination

Q. (By Mr. Tobin): When did you loan this money to Joseph Kaiser, this \$960.00?

A. About June, 1954.

Q. You knew he owed you this money at the time you were examined in this court on September 6, 1955, did you not?

A. I have known it ever since I gave it to him.

Q. You were questioned with regard to your assets in this court at that time. Will you please tell us why you did not tell us about asset that you had against Joseph Kaiser? I want to read [226] that part about any loans you made.

The Referee: You will have to indicate in the record what you are asking.

Q. (By Mr. Tobin): Page 18, lines 16 to 19 of the reporter's transcript on the Section 21(a) examination, held in this court on September 6th. It reads:

"Q. When was the last time you made a loan?

"A. It has been a long time; many months ago."

Then, in response to the question, beginning at line 22, the same page:

"Q. (By Mr. Tobin): To sum the whole thing up—the only property that you have is the liquor that is in your garage; your interest in the liquor license, whatever it may be; and the interest in your family home back in New York, Niagara Falls, whatever that may be—is that right?

(Testimony of John Collins.)

"A. Well, I don't know. You talk about interest I have in the liquor license. It just depends on whether there is an interest there. The State Board says it is a privilege. Some people would say it is [227] an asset. I consider it somewhat as a liability. It costs a dollar a day to keep it."

Now, at that time when you were questioned as to your assets, why did you not mention this \$950.00 claim you had against this man named Kaiser?

A. Why, it was as many assets as I could think of at the time.

Q. The only assets you claim at that time were the liquor license and the liquor, is that not right?

A. I really could not tell you.

Q. Now, with regard to your interest in the fixtures and personal property—may I have the last exhibit offered in evidence, Exhibit No. 11?

Referring to Bankrupt's Exhibit No. 11, paragraph 25, on page 2-A, will you please examine 25, paragraph 25? Have you read it?

A. Yes, I have.

Q. That is his signature on Bankrupt's Exhibit No. 11, is it not?

A. Over here is my signature.

Q. What do you mean, in paragraph 25, which I will read:

"It is specifically understood and agreed that between the sellers, Stanley E. Lefringhouse, is the sale of the furniture, fixtures and equipment, [228] goodwill, lease, trade name, inventory etc.; and the only interest John Collins has is the on-sale liquor

(Testimony of John Collins.)

license, all funds due at the close of escrow herein to the seller shall be paid solely to Stanley E. Lefringhouse with no monetary interest of any nature whatsoever to John Collins."

Now, did you or did you not claim an interest in the fixtures, equipment, inventory, and so forth, at the time you signed Bankrupt's Exhibit No. 11?

A. Yes, it was with the understanding of this \$5,500.00 that Stanley Lefringhouse signed.

Q. What \$5,500.00 was that?

A. It is right here. (Indicating.) The reason he sold the fixtures was on account of that chattel mortgage he had with Everett Rogers.

Q. This last instruction, January 21st, was signed long after the original escrow instructions, on January 14th, is that right?

A. I believe that was. My signature and the signature on the top sheet were about the same day, and Mr. Lefringhouse's signature and Juanita F. Lichtenfeld's was on the 14th.

Q. You testified yesterday regarding \$1,000.00 in cash, and another \$2,500.00 that went through your hands.

The Referee: The check was for \$1,000.00? [229]

Mr. Tobin: Yes. In what sum did you get the \$2,500.00 of that \$3,500.00, a check or cash, or what?

A. Well, at first I gave Lefringhouse a check for \$2,500.00. He went to the bank and could not cash it, and I had to go to the bank and cash it and brought the cash to him.

(Testimony of John Collins.)

Q. What did you do with the cash?

A. I gave it to Stan Lefringhouse.

Q. Do you know a man by the name of Louis Trapini? A. Yes.

Q. What is his occupation?

A. I believe he was a liquor salesman.

Q. Do you know where he is now?

A. I believe he is in Los Angeles.

Q. He is in the Penitentiary, is he not?

A. I don't believe so.

Q. Is it a fact you gave this \$3,500.00 to Louis Trapini?

A. How would I get Stan Lefringhouse's signature?

Q. The question is, did you not give the \$3,500.00 to Louis Trapini in cash?

A. That is not true; that is absolutely not true.

Q. Let's pinpoint it down. Is it not a fact you gave him \$2,500.00 in cash, personally, instead of \$3,500.00? [230]

A. It is not true that I gave Louis Trapini any amount of money at all.

Q. Did you have any dealings with him in connection with that license? A. No.

Q. None at all?

A. No, sir. I did not become acquainted with the man until after the license was issued.

Q. Under what circumstances did you become acquainted with him?

A. I owned the beer bar at Bell Gardens, the Schooner Cafe; and I was down at the brewery

(Testimony of John Collins.)

where he worked, or employed at—I was down there for dinner one day, and I met him, among other people.

Q. Now, getting back to the Kaiser loan again, you were asked, were you not, at page 17 of the transcript of the examination had in this courtroom on September 6, 1955, at line 11:

“Q. (By Mr. Tobin): Are you engaged in money lending?

“A. Not at this time. I have loaned a little money.

“Q. Approximately how much do you have out on loans at the present time?

“A. That would be an awful hard question to [231] to answer because I would have to think of the people. I would guess maybe \$2,000.00.

“Q. Do you have notes from them?

“A. Well, no; I will tell you—you don’t get a note when you loan a guy ten or twenty dollars.

“Q. (By the Referee): What was the largest amount of money you have loaned to any individual that has not paid you back?

“A. I think it is \$184.00 at the present time.”

Did you so answer those questions?

Q. Did you know that this man Kaiser owed you about \$950.00 when you made up the list of your assets?

A. Yes; I gave it to Mrs. Carver.

Q. And did you tell Mrs. Carver to put that in as an asset?

A. I did; I believe she did.

(Testimony of John Collins.)

Mrs. Carver: Among the accounts receivable.

The Referee: All right, proceed.

Mr. Tobin: That is all.

The Referee: Any other questions, Mrs. Carver?

Mrs. Carver: At this time I would like to read [232] the provisions of this insurance policy.

The Referee: Let me have it.

Mrs. Carver: Will you read up at the top of the second page.

The Referee: Reading from Pacific Mutual Life Insurance Company Certificate No. 574976, the policy in which John Andrew Collins is described as an employee of a subscribing employer.

(Reads provisions from the policy.)

The Referee: Is there anything else?

Mr. Tobin: That is all at this time.

Mrs. Carver: That is all, at this time.

The Referee: Mr. Tobin, have you any other witnesses?

Mr. Tobin: No, your Honor.

The Referee: Will you try to get this all organized? We will adjourn this case until two o'clock today.

(Whereupon, further hearing on this matter was continued until two o'clock this date, at which time the following proceedings occurred.)

Mr. Tobin: I would like to put Mr. Lefringhouse on for one or two questions.

STANLEY E. LEFRINGHOUSE

resumed the witness stand and testified further as follows: [233]

Q. (By Mr. Tobin): Mr. Lefringhouse, you have been previously sworn? A. I have.

Q. Did you at any time subsequent to January 14, 1954, enter into any agreement, orally or in writing, for a partnership between you and this bankrupt, Mr. Collins? A. I did not.

Q. Did you at any time prior to January 14, 1954, enter into such an agreement?

A. I did not.

Q. Did you ever at any time enter into any such an agreement? A. I did not.

Q. Either orally or in writing? A. No.

Q. Now, with regard to the claim against you in the sum of \$1,800.00, which this bankrupt asserts is an asset of his estate? Do you concede that you owe him anything?

A. No, I don't owe him a cent.

Mr. Tobin: You may cross examine.

Q. (By the Referee): What did you mean when you said that he got all of the money out of that?

A. I understand that they are talking about the \$1,800.00, on the inventory. Well, Lichtenfeld put up, produced three or four checks, which were only [234] for gas and power; and he said he bought a few pieces of equipment which were not in the escrow, and any moneys given to the inventory were either given directly to Mr. Collins; or, as I recall, there were two checks, and one was given directly to John (Collins) and the other I signed over to

(Testimony of Stanley E. Lefringhouse.)

him. Mr. Lichtenfeld never brought those checks here.

Q. I still do not understand what you mean. You mean by the original agreement, by which Lichtenfeld was buying it? A. Yes.

Q. The \$2,000.00 was put in escrow, was it not?

A. Lichtenfeld put \$3,000.00 in escrow.

Q. Did he pay anything out of the \$3,000.00?

A. Yes, he did.

Q. Just roughly, how much was that?

A. As I recall, it was between \$1,600.00 and \$1,800.00.

Q. Has that been put in here?

A. Yes, it has.

The Referee: All right, you may cross examine.

Cross Examination

Q. (By Mrs. Carver): Did you and Mr. Collins enter into any agreement for the formation of a corporation covering the cocktail bar?

Mr. Tobin: Objected to, not proper cross examination. [235]

Q. Did you and Mr. Collins *ever into* any agreement for the formation of a corporation, of the cocktail bar?

A. We talked about a corporation and went ahead and started one, but no assets were ever transferred. We could never agree. I owned the furniture and equipment and he owned the liquor license, and we could never agree, and it stopped right there.

(Testimony of Stanley E. Lefringhouse.)

Q. Was the corporation ever formed?

A. I don't know the legal term — nothing was ever transferred to it and no stock was ever issued. That is all I know about it.

Mrs. Carver: May I have this marked?

The Referee: Bankrupt's Exhibit No. 13.

Q. (By Mrs. Carver): I will show you a photostatic copy of Articles of Incorporation of Colleff's, No. 288,658, and ask you if this is your signature on this Articles of Incorporation?

A. Yes, that is my signature. May I read this?

Q. Yes, but I want to ask one more question.

The company, was that a corporation formed partly by your name and partly by Mr. Collins' name?

A. That I don't know.

Q. Was it in connection with a cocktail bar known as Stan's Stagecoach Stop? [236]

A. We discussed the corporation and we formed whatever this is here; but there was never any assets transferred to it or never any stock issued.

Q. You might just read that.

A. (Witness reading.)

Q. I note this is dated June 22, 1954. During that time was the business being operated?

A. Yes, it was.

Q. That was after it had been taken back from Mr. Lichtenfeld?

A. Yes, it was.

Mrs. Carver: That is all.

Examination

Q. (By the Referee): As I understand, after

(Testimony of Stanley E. Lefringhouse.)

the Lichtenfeld deal fell through, from that time on you were the sole owner and everything connected with this cocktail lounge except the license?

A. I was the sole owner of all the equipment, furniture, and the lease, everything but the business and his license.

Q. Who owned the business?

A. John A. Collins.

Q. Now, let us take a look at this involuntary petition for a moment. Do we have in evidence, Mr. Tobin, when the claim of Acme Distributing Company came into being, for \$417.00. [237]

Mr. Tobin: Yes, that was testified to.

The Referee: Do you recall when it was, whether it was before or after, let us say, June 1, 1954?

Mr. Tobin: I don't recall. I didn't take any notes.

The Referee: Very well.

Mr. Tobin: Counsel tells me it was the 14th of May, 1954, between May 14, 1954, and December 16, 1954.

Q. (By the Referee): Mr. Lefringhouse, you got all of the receipts from the business, didn't you?

A. I did not.

Q. Who got some of them?

A. Well, when the matter was in escrow, Mr. Collins had about \$4,000.00 worth of liquor bills in there, at the time of the Lichtenfeld escrow—there was \$4,000.00 in it. As of the time right now, there is only about, I would say \$2,800.00. \$1,200.00 was

(Testimony of Stanley E. Lefringhouse.)

paid off on back bills and back taxes and there was just items like that, just bills.

Q. After you took possession again, after the Lichtenfeld deal had fallen through, you retained all of the money? None of it went to Mr. Collins, is that right?

A. All of the money that came in was used to pay bills, yes, sir. [238]

Q. Mr. Collins got nothing?

A. That is true.

Q. You have never rendered an accounting to Mr. Collins, have you, for that period?

A. No.

Q. Well, conceivably, then, it could turn out that you are responsible for the bills that were incurred during that period and not paid unless they might be offset by something that you paid to Mr. Collins. Now, let me ask you this question. Do you deny you have received a check for \$1,000.00 from Mr. Collins in the latter part of 1952?

A. No, I don't deny it. May I explain it?

Q. What did you do with the money?

A. I was running a bar in the same place there in 1952; and I had gone down to the State Board many times, to try to get a liquor license; and each time I would go down they would say, "We are not issuing them; put in your name on the list." John (Collins) and Larry (Collins) were in this juke box business and they came to me and they said they could get a license for \$3,500.00, and they would get it for me, and I would pay them \$5,500.00

(Testimony of Stanley E. Lefringhouse.)

back, with a note at \$150.00 a month. And, so what happened, John Collins wanted Larry Collins to go down with me to the Bohemian Distributing Company and meet Louie Trapini. [239]

Q. What did you do with the \$1,000.00?

A. I gave it to John's brother, Larry Collins. We went down and paid Louis Trapini \$1,000.00 on this liquor license.

Q. You paid \$1,000.00 on the liquor license?

A. Yes; and Trapini was going to "grease the track" and see that the liquor license was issued.

Q. How did you give the thousand dollars into this matter?

A. As I recall, I went up to John Collins' house, and his wife wrote a check. I met Larry Collins down at our place, at the liquor store, the bar, and went over to the bank and cashed the check with Larry Collins, and went down and gave him the money, and went down to the Bohemian Distributing Company.

Q. Your testimony is, you gave \$1,000.00 in cash, is that right? A. That's right.

Q. Did you later on receive \$2,500.00 from Mr. Collins? A. I did not.

Q. Or any other sum?

A. I received in April two checks which were, as Mr. Collins testified, they were a loan, absolutely a loan, and I paid that money back—he ordered some liquor, and I gave the rest in cash.

Q. How much was that? [240]

(Testimony of Stanley E. Lefringhouse.)

A. That was approximately \$600.00—one check for \$250.00, and I forget the other—\$287.00.

The Referee: Any other questions?

Mr. Tobin: That is all.

Cross Examination

Q. (By Mrs. Carver): Mr. Lefringhouse, do you recall in December, 1954, that Mr. Collins handed you \$2,500.00 in cash?

The Referee: Wait a minute. What year?

Mrs. Carver: 1952.

A. No, he did not hand me any cash. He went down on the second visit to Louis Trapini. I saw him hand the money, \$2,500.00; and Louis Trapini told us to go to the Board, and they would “grease the track.”

Q. (By the Referee): Do I understand you saw Mr. Collins give this money, \$2,500.00, to Mr. Trapini? A. Yes, I did.

Q. Was that at the same time you gave him \$1,000.00?

A. No, that was about—this was Larry Collins. I said John Collins gave Louis Trapini \$2,500.00 on, approximately, December 31, 1952.

Q. And when would you say you gave him the \$1,000.00? A. I did not. [241]

Q. No, Trapini.

A. I did not give it to Trapini. I went down with John's brother, Larry; and I saw Larry give \$1,000.00 to Trapini.

Q. Was that the same \$1,000.00 you got when you cashed Mr. Collins' check?

(Testimony of Stanley E. Lefringhouse.)

A. That's right.

Q. You then handed it to Larry?

A. That's right.

Q. And that was about what date?

A. December 27, 1952.

Q. Then you think it was on December 31, 1952, that you saw John Collins give the same man \$2,500.00?

A. Approximately.

Q. Showing you Bankrupt's Exhibit No. 11, the escrow instructions, and calling your attention particularly to letter you deposited in escrow January 21, 1954, authorizing the escrow to pay John A. Collins \$5,500.00, why did you sign that paper?

A. After this license that John and Larry were going to get for me, supposedly for me, they were going to put it in my name, and, instead, when we got to Mr. Moran, at the Board of Equalization, it was put in John's name. The agreement was that I was to pay him \$5,500.00 at \$150.00 a month. After the agreement, or the license was in his name, he wanted all cash, \$5,500.00. He invested \$3,500.00. [242] That is why, later, he would not sign the escrow until he got his \$5,500.00.

Q. Bankrupt's No. 10 is a copy of a note that you and John Collins signed for \$4,100.00. How was that amount arrived at?

A. It was \$3,500.00 — at this time there was \$3,500.00 they invested in the license, plus \$325.00 tax that you have to pay the State, and five percent for 18 months from January, 1952, until July, 1954 — January, 1953, I mean, to July, 1954 — 18

(Testimony of Stanley E. Lefringhouse.)

months—five per cent on \$3,825.00—it came out \$4,111.00. They knocked off \$11.00 and it was just \$4,100.00.

Q. What were you to get for the note?

A. I was to get the liquor license, before they wanted \$5,500.00; but when this investigation started up, in 1954, the Bonelli matter, then they came to me and they said they would sell the license for \$4,100.00.

Q. Your testimony is that you were going to get the liquor license? A. Yes.

Q. Let us look down at the bottom of this paper. It says: "The foregoing obligation is hereby assumed and ratified this blank day of blank, 1954, Colleff, Incorporated, a California corporation."

What was that put on there for? We will [243] concede it was never probably signed by anybody, but why was it typed on there?

A. I don't know that. I went over there and we made this note, like I have told you, they wanted John Collins and my name on it, made to Larry, a chattel mortgage, so that they could discount the note. We went over to Miss Hofstetter's office and she made out a note. She was to hold the note. There was no delivery.

Q. You don't know anything about that typing I called your attention to? You don't even know what it means?

A. I can see they have what you say, a corporation.

Q. In this corporation you were to put in every-

(Testimony of Stanley E. Lefringhouse.)

thing in connection with the cocktail bar, were you not, into the corporation?

A. We discussed the corporation, yes.

Q. You were going to put everything you had in it?

A. We never could get together on it.

Q. And was Collins to put his license in?

A. Well, the original discussion on the corporation was to include even the liquor store. Then Collins made the agreement he would only pay \$12,000.00 for the liquor store. Then he backed out [244] of the whole corporation idea, killed it right there; and we never transferred anything to it.

Q. If you had formed the corporation you would have been a stockholder, would you not?

A. If we had formed the corporation, yes.

Q. And Mr. Collins would have been a stockholder?

A. I think so, sure.

Q. That was the general intention?

A. Sure.

Q. Were you to have fifty percent and Collins to have fifty percent?

A. Well, that was to be decided. He wanted the fifty percent, but for a \$3,500.00 license. I didn't want to give him fifty percent when I had the equipment and lease and everything else. That is why we could not get together.

The Referee: Any questions?

Mr. Tobin: No, your Honor.

Mrs. Carver: No.

(There being no further questions, the witness was excused.)

Mr. Tobin: If your Honor please, we wrote to the Metropolitan Life Insurance Company for a report on these policies, and I have just received a letter from the Insurance Company. I will ask Mrs. [245] Carver if she will stipulate that if R. W. Arfson, Superintendent of the Issue Division of the Metropolitan Life Insurance Company, with his office in San Francisco, were called as a witness, he would testify in accordance with the facts as set forth in Metropolitan Life Insurance Company's office on December 2, 1955? I would like to offer this instead of Exhibit 12. It is the same facts.

The Referee: Well, we will leave the other one in the record. This will be Bankrupt's Exhibit 14.

Mr. Tobin: I would like to offer the Metropolitan Life Insurance Company's letter.

The Referee: Petitioning Creditors' Exhibit No. 9.

Mr. Tobin: I will ask you, Mrs. Carver, if you will stipulate that if Francis E. Hannon, Assistant Counsel of Columbia National Life Insurance Company, of Boston, Massachusetts, were called as a witness, he would testify in accordance with his letter to us of December 1, 1955, which I show you.

Mrs. Carver: I so stipulate.

Mr. Tobin: Then we offer in evidence the letter of December 1, 1955, of Columbia National Life Insurance Company.

The Referee: Petitioning Creditors' Exhibit No. 10.

Mrs. Carver: As to the letter from the Metropolitan Life Insurance Company, I will stipulate

as to the factual portion of it, reserving a motion [246] to strike as to any legal conclusions that might be contained in it.

The Referee: That will not be necessary. The Court will disregard any legal conclusion. Is there anything else?

Mr. Tobin: That is it, your Honor.

The Referee: Have you anything else?

Mrs. Carver: Yes. I would like to introduce at this time other provisions of the Health Accident Policy, to be read into the record.

The Referee: Let me see it. Let us say for the record at this time that Pacific Mutual Life Insurance Company Certificate No. 574,976, in addition to the provisions already read into the record, contains provisions for surgical expense benefits, laboratory, X-ray expense benefits, and additional accident expense benefits. Is there anything else?

Mrs. Carver: Not at this time.

The Referee: Well, have you made your computations?

Mrs. Carver: We have.

The Referee: What have you got, Mr. Tobin?

Mr. Tobin: I have got mine roughed out in the way I would argue it orally.

The Referee: Very well. Mr. Collins, do you anticipate that the hearing before the Industrial Accident Commission is set for Wednesday, the 7th, tomorrow?

Mr. Collins: I believe so. I called my attorney [247] and he is in San Diego today, but I expect he will be back tomorrow.

The Referee: I would like to continue this matter to Thursday, December 8th, at 10:00 o'clock.

Mr. Collins: I have a subpoena for Thursday.

The Referee: In what court?

Mr. Collins: The 9th of December.

The Referee: The 9th of December is Friday.

Mr. Collins: The 8th of December, at 1:00 o'clock.

The Referee: All right. This matter will be continued to December 8th at 10:00 a.m.

(Thereupon, further hearing in this matter was continued to Thursday, December 8th, at 10:00 o'clock a.m.) [248]

Thursday, December 8, 1955, 10:00 O'Clock A.M.

The Referee: Anything further?

Mrs. Carver: At this time Mr. Collins might take the stand and testify on what happened at the hearing yesterday.

JOHN COLLINS

resumed the witness stand, having been previously duly sworn, and testified further as follows:

Examination

Q. (By Mrs. Carver): Mr. Collins, there was a hearing yesterday before the Industrial Accident Commission in connection with the injury arising out of the course of your employment.

A. That is true.

Q. Will you state what happened in connection with that hearing yesterday.

A. There was an established minimum offer, \$3,625.00, made before Referee Batistich.

Q. That offer was made by the insurance car-

(Testimony of John Collins.)

rier for the employer? A. That is true. [249]

Q. Is that offer now under submission?

A. Yes, by the Referee.

Mrs. Carver: That is all.

Q. (By Mr. Tobin): That is subject to \$1,010.00
lien of the State of California?

A. That is true.

Mr. Tobin: Now, I would like to take this witness under Section 21-J, if your Honor please.

Examination Under Section 21-J

Q. (By Mr. Tobin): In your list of liabilities that was submitted to the Court, did you submit an indebtedness of \$4,100.00 due to your brother Lawrence Collins? A. No.

Q. You knew at the time that you submitted this list of liabilities to the Court here that that suit No. 639780 was pending in the Superior Court against you on that note, did you not, or on that indebtedness?

A. Am I named one or as John Doe?

Q. Named one, as a defendant, in that suit?

A. I believe I was named in it some how.

Q. And you knew all about the suit, didn't you?

A. I did know about it, yes.

Q. You owe your brother \$4,100.00, don't you?

A. I don't know whether I do or whether Stan Lefringhouse does. [250]

Q. Your deposition was taken in connection with that suit on March 30, 1955, was it not?

A. I couldn't tell you.

(Testimony of John Collins.)

Q. Just take a look at this.

A. That is what the book says, March 30, 1955.

Q. Let us look at the beginning of the deposition. You are the John Collins whose deposition was taken at that time?

A. I believe so.

Q. You received a bill, did you not, from the court reporter, Robert L. Martin, for a copy of the deposition?

A. No.

Q. Were you told by your attorney, Miss Hofstetter?

A. That's right.

Q. The court reporter was trying to get his compensation for your copy of that deposition?

A. No. I knew there was going to be a bill for it eventually.

Q. Have you ever paid that bill?

A. The deposition has not been finished, has it? The Referee: Just answer the question.

A. No, I never paid the bill.

Q. (By Mr. Tobin): Now, then, in that deposition you admit, don't you, having signed a promissory note to [251] your brother Larry Collins, in the sum of \$4,100.00, that he sued on in Action No. 639,780?

A. I did sign a promissory note for \$4,100.00.

Q. And when Larry Collins sued on that note you were never served, were you?

A. I believe I was, but I couldn't swear for sure, because I would have to ask the attorney.

Q. You were living at the same address you are living now, were you not?

(Testimony of John Collins.)

A. I have lived there ever since I have been in California.

Q. And your brother Larry Collins visited your home occasionally? A. Yes.

Q. You knew that he knew where you lived?

A. Sure, he knows where I live.

Q. Do you know any reason why you were not served in this Action No. 639,780?

A. I couldn't tell you. I don't know whether I was or was not.

Q. You don't deny, do you, you signed a promissory note to your brother, Larry Collins, on July 6, 1954, for the sum of \$4,100.00?

A. That note is right here in the testimony.

The Referee: The question is, did you sign the note. [252]

A. I believe so. I am quite positive I did.

Q. (By Mr. Tobin): Have you ever paid it?

A. No.

Q. You are still owing it?

A. Well, if I owe it.

Mr. Tobin: That is all.

Mrs. Carver: No further questions.

(There being no further questions, the witness was excused.)

Mr. Tobin: I will call Robert L. Martin. [253]

* * * * *

The Referee: Let us try to sum up as best we can. I have before me the tabulation of assets and liabilities made by respective counsel in the case.

From the figures that I have I note the following amount of liabilities:

Trade creditors, \$2,903.45.

Mrs. Carver: I believe that is taxes.

The Referee: No. Medical expenses, \$1,400.50; automobile, liability, \$600.00; taxes, consisting of sales taxes, \$676.50; State Unemployment, \$244.18; the United States, \$2,963.85; total \$3,884.53. The total of all the items mentioned is \$8,788.48, to which should now be added an obligation of Mr. Martin, the reporter, of \$78.75; making a total of \$8,867.23.

As to the liabilities in connection with the Collins-Lefringhouse note, I will make no comment on that at this moment.

On the asset side: the household furniture is difficult to evaluate in this case as it is in every case.

The rule of bankruptcy is that property (in determining solvency) must be construed at its fair value. In other words, as I take it, a man is not insolvent if he could exchange his physical property for money and secure enough money to pay his debts. I don't think it has ever been the idea [254] that the value to be taken into consideration should be only such value as might be received if the property was sold instanter. I think a more reasonable rule is indicated that the value is that which the alleged bankrupt could realize from his property in a usual or ordinary sale.

Now, obviously, household furniture to the owner thereof is worth considerably more than he can sell it for, unless it should be of a particular type,

such as valuable antiques or things of that nature. We cannot take the cost, obviously, and we cannot take the figure which represents the value to the bankrupt. We may try to arrive at the figure which he could realize if he set out to sell his household furniture either in one lot to a dealer or to a user, or piece by piece.

I think under the circumstances of this case \$2,000.00 is the fair value of the furniture, according to his testimony, that we have here.

As to the tools—we again have something of the same principle relating to household furniture. I think the tools had a fair value of \$300.00.

As to the records, there is some question. The bankrupt has testified that in his judgment certain of his records, or at least one album of records are collectors' types of records. What their value is, of course, is very uncertain. Collectors usually pay what they have to pay; and in doing so they will [255] go as high, if necessary, as they are disposed to pay.

In my judgment, all the records in this case, including the collectors' items, have a fair value of \$150.00.

The liquor situation, also, is rather confused and indefinite. Liquor, obviously, is a consumable item; and most people who have it on the premises are inclined from time to time to consume some of it.

I think the records in this case indicate a fair value of \$200.00 for the liquor.

The bar glasses have a value of \$40.00.

While there is no direct evidence so far as I can

recall with respect to the value of the Ford automobile, I think a fair assumption is that there is no equity in it.

If we have recorded the liabilities of \$600.00, I believe it is fair to put the same figure on the asset side.

The accounts receivable, according to the evidence here, have no value. The one account of substance is, I think, the Kaiser transaction, is that the name?

Mrs. Carver: Yes.

The Referee: It does not have sufficient support in the record to warrant the Court in making a finding that it has any realizeable value. The finding [256] of the Court is that the accounts receivable have no value.

I am still confused about the life insurance, and I will have to resort to the exhibits to summarize the situation.

The Columbia National Life Insurance Company, according to the Petitioning Creditors' Exhibit No. 10, states that its policy now has a cash surrender value of \$180.28. How much did you put that in for, Mrs. Carver?

Mrs. Carver: I had that \$168.00.

The Referee: All right. Let us leave it stand for the moment, \$180.28.

Metropolitan Life Insurance Policy No. 12704849, according to the Petitioning Creditors' Exhibit 9, had a cash surrender value of \$134.92 on August 22, 1955. What did you have?

Mrs. Carver: \$136.00.

The Referee: We will put down \$134.92.

Policy No. 16245450 had a cash surrender value of \$60.25. What did you have?

Mrs. Carver: \$61.00.

The Referee: Policy No. 540980754, according to the Petitioning Creditors' Exhibit No. 9 has no cash surrender value. What did you have?

Mrs. Carver: No value.

The Referee: Then, under the terms of the following policies, and I am now reading from [257] Petitioning Creditors' Exhibit No. 9, none of which is on the life of the bankrupt, nor owned by him, the cash surrender value is payable to the insured, and that is a group of five policies; in one the insured is Ada Collins; the other, John R. Collins; the other, the insured is Paul Andrew Collins; the other, the insured is Ada J. Collins; the other, the insured is Pauline J. Collins.

Now, what do you have on those policies?

Mrs. Carver: No. 697587, on the life of Ada Collins, \$104.51.

The Referee: How do you count that as an asset of Mr. Collins?

Mrs. Carver: The premiums were paid out of community funds.

The Referee: How much on that?

Mrs. Carver: \$104.51.

The Referee: Proceed.

Mrs. Carver: No. 131530294, on the life of John R. Collins, cash surrender value, \$33.88. No. 540980754,——

The Referee: No, I have No. 540980781.

Mrs. Carver: That is Ada Collins. That has no value.

On No. 540980754, no value.

No. 3891386, on the life of Pauline J. Collins, \$144.62.

No. 5978642, on the life of Paul Andrew Collins, \$106.74. [258]

The Referee: What other policies are there?

Mrs. Carver: There are two government policies, No. 223306——

Mr. Tobin: If your Honor please, we will object to the two government policies. There has been only one in evidence.

Mrs. Carver: I think Mr. Collins testified and it is in evidence that he has two \$5,000.00 government policies on his life, with the proceeds payable in the event of his death to his wife; and the other five thousand payable to his children.

The Referee: Very well.

Mr. Tobin: There is only one shown.

The Referee: Objection overruled.

Mrs. Carver: The figure on No. 223306 is \$514.15. On the missing policy—the policy itself is missing—we got the records from Washington or Denver on this missing policy. That is \$514.15.

The Referee: Were they both taken out at the same time?

Mr. Collins: There was originally one \$10,000.00 policy and they were split up.

The Referee: Any others?

Mrs. Carver: I believe that is all, your Honor, that is, other than the hospitalization.

Mr. Tobin: Mrs. Carver, might I ask if it is [259] true that there has been money borrowed on the policy and that is the reason it is missing.

Mrs. Carver: I would not be able to answer.

Mr. Collins: No. The only policy I know of where there has been any money borrowed on was done by my father and mother, on the Columbia National policy. I believe we discussed that. The loan was paid off by my father and mother years ago.

The Referee: Subject to further proof the life insurance will be held to have a cash surrender value of \$1,403.75. The Court will exclude the policies, in which the insured are other than the bankrupt.

On the Lefringhouse situation the Court finds that this is entirely unliquidated. It is impossible to determine in this proceeding whether it constitutes an asset or liability; and included in that is the \$4,100.00 note. It is signed both by Mr. Collins and Mr. Lefringhouse. If Mr. Collins should have a judgment entered against him in connection with that note, he might possibly have the right to contribution from Mr. Lefringhouse, in whole or in part.

One of the things that strikes the Court's attention is that the Lefringhouse deal, all through it, from the very beginning, involved a liquor license. Mr. Collins, apparently on his own initiative, apparently without the concurrence of Mr. Lefringhouse, appropriated the license exclusively [260] to his own use. I think the testimony is that he

came to the place of business and took the license off the wall. In any event he has treated it as his exclusive property, in that he has given notice of intention to transfer this license; in fact, he has done everything that would be required of him to perfect and consummate such transfer.

So, what is the effect of that? If there was some kind of an agreement between Mr. Lefringhouse and Mr. Collins with respect to the cocktail bar prior to the time that Mr. Collins removed the license, did the removal constitute a rescission, a termination, a cancellation of any such agreement? If so, what would be the legal effect as to the obligation of Mr. Collins to Mr. Lefringhouse, or vice versa?

So that the Court has come to the conclusion that so far as the Lefringhouse transaction is concerned it can be considered neither an asset nor a liability.

There is an action pending in which Mr. Collins on his own behalf claims damages, or the right of recovery, by reason of certain expenditures made on behalf of a minor son. That, also, is in an unliquidated state. The Court is not in any position to give it any value. It may possibly result in a judgment in favor of Mr. Collins. On the contrary, [262] judgment might be in favor of the defendants in the case.

Something was said about cash on hand at the date of bankruptcy, uncashed checks. The evidence is so vague with respect to that that the Court

must make a finding that no such assets were in existence.

Evidence is in the case with respect to a deposit made with the Vista Escrow Company. At the outset it was indicated there was \$3,000.00 in the escrow. I think the evidence now, you can say, shows that the amount is only negligible. We have not been favored with any details of the escrow. We don't know what disbursements were made, whether or not Mr. Collins might possibly have a cause of action against anyone who received money out of the escrow. The situation is so indefinite that no asset value can be attached to it. The Court's finding is that Mr. Collins has no asset so far as the Vista Escrow is concerned.

Now, insofar as the matter that was heard yesterday—it was indicated that there might be a recovery of \$3,625.00. I think the evidence shows there is a lien against that—my notes, I think, show the exact amount, but let us say that, approximately, there is \$1,000.00.

Mr. Tobin: It is \$1,010.00.

The Referee: We will just take \$1,000.00. That would give us a net of \$2,625.00. Do you have an [262] attorney in that case, Mr. Collins?

Mr. Collins: Yes, sir.

The Court: Is there any agreement as to compensation?

Mr. Collins: The Referee decides that.

The Referee: There will be something to be paid to counsel.

A. (By Mr. Collins): I don't know whether it

comes out of that or whether to just send a bill to the insurance company.

Mr. Tobin: Might I ask if the Referee did not allow \$400.00 against the award to the attorney?

The Referee: Has any allowance been made by the Referee?

A. (By Mr. Collins): Not to my knowledge.

The Referee: The Court is without any experience before the Industrial Accident Commission.

Miss Hofstetter: Ordinarily they are paid out of the award. \$400.00 would be an exceptionally high award in this sort of thing. It would normally run between \$250.00 to \$300.00, possibly \$350.00. The attorney might get \$400.00, but it would come out of the award.

The Referee: Well, may we say there would be a deduction of \$250.00?

Mr. Tobin: So stipulated, so far as the petitioning creditors are concerned. [263]

The Referee: If this thing should get close, why, we will give counsel on both sides an opportunity to review the figures. That would give us a net of \$2,375.00.

Now, Mrs. Carver, what about the insurance benefits in the event there is an award by the Industrial Accident Commission?

Mrs. Carver: I believe, your Honor, if there is an award, then the provisions of this insurance would have no effect. This provision would be in the event the injuries are not compensable under the Industrial Accident.

The Referee: All right. Are there any other assets, Mrs. Carver?

Mrs. Carver: I cannot think of any other.

The Referee: Let me take that sheet you had here. I will just write it over: cash surrender value; household furniture; records; liquor; accounts receivable; bar glasses; Hospital and Health Insurance; uncashed checks; claim against Davis & Pipe Reaming; claim for injury to son; life insurance; Vista escrow; bar fixtures; accounting with Lefringhouse. Now, have we covered them all?

Mr. Tobin: I don't believe the court covered the bar fixtures.

The Referee: Yes, I said that is involved. In Mr. Lefringhouse's situation I cannot regard it in this proceeding, either as an asset or a liability.

I have total assets of \$7068.75, against liabilities of \$8867.23. [264]

Under the petition I think that we will have to adjudicate Mr. Collins a bankrupt in this proceeding because, apparently, he has a valuable assets that is worth somewhere between four and five thousand dollars, which we may not take into consideration in determining solvency; and if he were to liquidate that assets he might possibly be able to bring about some kind of a disposition of this action.

Of course, he has his taxes of \$3884.53, which probably would absorb most if not all of the proceeds of the sale, from the sale of the liquor license. Then he has another asset of not less than \$1400, apparently on his life insurance policies.

However, all we can do here is to rule on the case as we have it, on the petition in involuntary bankruptcy.

In light of the findings of the Court with respect to the assets and liabilities, the conclusion must be that the bankrupt was insolvent on August 22, 1955; and that if he was—if he was insolvent, he committed this bankruptcy which is here complained of.

You made some reference, Mr. Tobin, offhand, during the course of the examination of some witness to the transfer of something—not the liquor license—which might come within the first act of bankruptcy. I think the only allegation is as to the liquor license, isn't it?

Mr. Tobin: That is right. [264-A]

The Referee: All right. I assume you want findings.

Mrs. Carver: Yes, your Honor. I note the Court has ruled on the title to some property.

The Referee: Yes.

Mrs. Carver: I might at this time call the Court's attention to the provisions of the Constitution of the State of California, wherein the exception to veterans is provided for.

The Referee: I would be glad to hear it.

Mrs. Carver: This provision is that property being assessed to both husband and wife's name—it is not necessary that the bankrupt and his wife have the property assessed to their names to get the veteran's exemption—either in the wife's name or the husband's name. I would like, if the Court would permit, to procure and give as a part of

the evidence in this case the statement signed by husband and wife with the Tax Assessor so that the record may be complete in connection with the homestead.

Mr. Tobin: That would not change things, and would be immaterial.

The Referee: Let me see if I understand. You said that the veteran's exemption may be claimed whether the property in question stands of record in the name of the veteran or the name of his wife, is that it? [265]

Mrs. Carver: In effect, except property in an amount over \$1,000.00.

(Reading to the Court the provision in question.)

Mr. Tobin: That would be entirely immaterial. The title stood in her name and that is it.

The Referee: What do you think is the application of that?

Mrs. Carver: I don't know, your Honor, but I think it will show it was claimed to be owned by Mr. Collins, or by both of them. Personally I have not seen the application, and I may be taking a chance in submitting it to the Court.

The Referee: I won't require you to file it. You may file it, or, rather, a photostat of it, and it will be marked as Bankrupt's Exhibit next in order.

Now, let us say that the statements therein contained are favorable to the bankrupt in this case, that is, that such statement might tend to support a finding that the property on August 22, 1955, was community property—I want to cover that here, in my resumé, or summary of the evidence, so that

there may be no doubt in the minds of counsel or anyone else as to my views. I would still hold that the evidence is insufficient to overcome the presumption, because that particular bit of evidence might support or tend to support a finding that it was community property—it [266] is by no means conclusive that that would be the finding, and if the matter came up for determination by a court in which Mr. Collins was plaintiff and Mrs. Collins defendant, or vice versa, no one could say what the finding of the Court would be, or the legal conclusion that the Court would draw from the facts. That is why I say that this evidence is not sufficient to overcome the presumption.

We must always remember this—that Mr. Collins, by his voluntary act, placed his wife in a position where, dealing with third parties, she could have disposed of this property without Mr. Collins' consent; and that is the reason why I said this evidence is not sufficient to overcome the presumption.

The order of adjudication should be in a separate instrument. We will need, as you know, three of the orders of adjudication. You might as well make three of the findings and conclusions for this office in case we should need them. Will you deposit the original and the necessary copies for the use of this office, and transmit copies to counsel. We will hold the originals for five days before any action is taken. If counsel for Bankrupt wish to do so, they may make some suggestions as to form.

[Endorsed]: Filed December 19, 1955. [267]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Proceedings of March 14, 1956

The Referee: In the Matter of John Collins.

Mr. Tobin: Ready.

Mrs. Carver: Ready. Your Honor, do you have the order remanding the case?

The Referee: Yes.

Mrs. Carver: I don't know whether the court would be interested in the transcript of hearing before Judge Yankwich.

The Referee: Yes. I would like to see it.

(Pause while Referee reads transcript.)

The Referee: You may proceed.

Mrs. Carver: I will call Mrs. Collins.

ADA JANE COLLINS

a witness called on behalf of the Bankrupt, having been first duly sworn, testified as follows:

The Referee: Will you state your name.

A. Ada Jane Collins.

Direct Examination

Q. (By Mrs. Carver): Are you the wife of Mr. Collins, the Bankrupt in this proceeding?

A. I am.

Q. Where do you reside now?

A. 10423 East Townley Drive, Whittier.

Q. Is that the property that was acquired by purchase from Mr. and Mrs. Hogan?

A. It is. [2]

Q. At the time of the purchase of that property was there an escrow opened in connection with the purchase?

A. Yes.

(Testimony of Ada Jane Collins.)

Q. Where was the escrow opened?

A. At the Bank of America in Whittier.

Q. Did Mr. Collins handle the details of the escrow? A. He did.

Q. Did you have any conversation with Mr. Collins as to how the property should be vested?

A. No.

Q. Did Mr. Collins ever tell you to have the property deeded to you, in your name only?

A. No.

Q. Did Mr. Collins ever tell you that the property was yours? A. No.

Q. Did you ever considered the property your separate property? A. I did not.

Mr. Tobin: Objected to, calling for a conclusion.

The Referee: Objection sustained; the answer will go out.

Q. (By Mrs. Carver): When did you and Mr. Collins marry? A. In 1938.

Q. At the time of your marriage did you have any money [3] or property of your own?

A. I did not.

Q. Did Mr. Collins have any? A. No.

Mr. Tobin: What is the answer?

A. No.

Q. (By Mrs. Carver): What was the purchase price of the property involved here?

A. \$13,100.

Q. How much was paid down at the time of purchase? A. Approximately \$5300.

Q. Do you know where that money came from?

(Testimony of Ada Jane Collins.)

A. Well, it was an accumulation of savings over a period of years from his earnings.

Q. During the time of your marriage were you ever gainfully employed? A. No.

Mrs. Carver: That is all.

Cross Examination

Q. (By Mr. Tobin): You had charge of the opening of the escrow yourself? A. Yes.

Q. And you directed that the property be taken in your name?

A. Well, I don't know as I directed it be put in my name. It was a matter of convenience, so that I could take care of things so that he could go back East to get the money. [4]

Q. You were the one that directed the deed be made to you?

A. I don't know whether I should answer "yes" or "no." Do you have to direct someone?

Q. Who drew the deed?

A. I signed the paper, if that is what you mean.

Q. You mean the escrow instructions?

A. Yes.

Q. Who drew the deed from the seller to you—the person who sold you the property?

A. I don't understand.

The Referee: You don't understand the question?

A. No, I do not.

The Referee: All right; reframe the question.

Q. (By Mr. Tobin): You bought the property from these other people?

(Testimony of Ada Jane Collins.)

A. The Hogans, yes.

Q. So that you got a deed? A. Yes.

Q. Who drew that deed?

A. It is in my name. Is that what you want me to say?

The Referee: No. He wants to know if you know who actually typed up the deed?

A. No, I don't know.

Q. What did you mean by "for convenience"?

A. Well, there are papers and things. Naturally they have to be signed when you go into an escrow.

Q. Yes. [5]

A. My husband had to go back East to get the money because they would not take a personal check on an out-of-town bank. We wanted to be in there by Christmas, and Mrs. Hogan wanted to be with her husband for Christmas. There was not much time between the time we looked at the place and Christmas. John had to go back East, and someone had to be here to take care of the paper-work, and that is the way it was left.

Q. What paper-work do you mean?

A. The signing of the escrow papers.

Q. Were not those prepared beforehand?

A. Not to my recollection. This was a quick deal. I believe we looked at the house and moved in inside of a week or ten days.

Q. How long was he gone?

A. That I don't recall.

Q. He flew back?

A. Yes, to my recollection.

(Testimony of Ada Jane Collins.)

Q. He was only gone two or three days apparently. A. I really can't remember.

Q. And before he left who directed the title to the property be made to you?

A. I did not direct any title to be made to me at all.

Q. Was Mr. Collins the one that gave directions? A. I don't know.

Q. You don't know who did?

A. All I know is that I signed the papers. [6]

Q. You claim now that you don't own the property as your separate property?

A. We own it together. We don't own anything that way. What belongs to one belongs to the other. We just don't live that way.

Mr. Tobin: That is all.

The Referee: Is there anything else?

Mrs. Carver: No, your Honor.

(Witness excused.)

The Referee: Do you have any other witness?

Mrs. Carver: No; that is all, your Honor.

The Referee: Do you have any?

Mr. Tobin: No, your Honor.

The Referee: All right. Mrs. Carver, what do you think about it now?

(Discussion by Mrs. Carver.)

The Referee: You do not need to cite any authority upon the general law. It will be conceded by Mr. Tobin, as it is by the Court, that the presumption we are talking about is not conclusive. You do not contend otherwise, do you, Mr. Tobin?

Mr. Tobin: No, your Honor.

The Referee: You do not say this is a conclusive presumption in this case, do you?

Mrs. Carver: No.

(Discussion.) [7]

The Referee: I think we are agreed upon the law. I think the only question, as Judge Yankwich has indicated in his opinion—which I have read from beginning to the end—is as to whether this Referee believes the testimony that is given here by Mr. or Mrs. Collins, or either of them.

First of all, let me open my mind to you. So far as Mr. Collins is concerned, his testimony throughout the proceeding is so utterly unreliable that the Court could not place any confidence in any of it. Now, I am not making any suggestion of willful perjury on the part of Mr. Collins, but I don't know why so many of his statements turn out to be grossly incorrect. He talked about a \$3000 amount of money tied up in an escrow, I think it was; and it turned out to be, I think that actually there was a very small amount of money actually available.

Mrs. Carver: If your Honor please, as to that, I don't believe there is anything on the face of it.

The Referee: All right; but it was just a careless statement, then, and why? Let me go along further, then I will hear you. Why? Because Mr. Collins instinctively wanted to build up the asset side of the picture and diminish the liability side, because that was the only question here—the matter of his solvency.

Now, I do not believe Mr. Collins' testimony about the transaction with which we are here concerned. I think [8] that it was given solely to put into the record evidence upon which this Court might hold that this real property was the community property of himself and wife; and that if the Court would so hold then it would establish solvency on his part.

Now, here is a married man who insists on giving away without consideration an item of property that is in the opinion of this court—I do not know if I made any findings on it or not,—but I would have if it were appropriate—was worth four or five thousand dollars, and here is a man who insists on giving it away. He did nothing to bring it back even after his creditors complained about it, and he does have creditors, he does have people he owes money to. Now, you have got to take all those things together. He wants to give away this asset—at least he says he does.

Now, it may well be that there was some deal under the table somewhere whereby John Collins expected to get some benefit from the transfer of this liquor license; but that is not what he says; and that is not what the transferee says. There was absolutely no consideration—John Collins wanted to give him this license, and he would take it. You take all of that, from one end of the record to another, the fact he wanted to give away this license; the fact that he has creditors and does not have money to pay them at the present time; and, further, that he is contending that he [9] has an asset

which under the laws of California his creditors nevertheless cannot reach.

Now, if this were a non-exempt asset I don't think John Collins would be now claiming he had an interest in it—I just do not. Taking it from there, what about Mrs. Collins? Should the Court believe Mrs. Collins' testimony?

Mr. Tobin: There is the presumption, also, that the wife is acting under duress of her husband.

Mrs. Carver: I would say that I don't believe the Court could disbelieve Mrs. Collins. * * * There is absolutely nothing to show that Mr. Collins intended to give this property to his wife.

The Referee: Well, may I interrupt you there? Now you are talking about the incidents of real estate transactions which have become necessary by reason of the practice of issuing policies of title insurance. We all know that title companies are loathe to insure title in a wife unless the husband of record has disclaimed any interest therein. But, remember that titles and their validity are decided by courts and not by title companies. Mrs. Collins might convince some court that this was her separate property notwithstanding the fact that Mr. Collins had not executed a quitclaim deed. There is nothing in the code which says if the husband has executed, delivered and [10] recorded a quitclaim deed that then the property shall be presumed to be the property of the wife. That is a requirement that is insisted upon by careful title companies. They don't want any undercover agreement between husband and wife, they want the husband on the rec-

ord, that he has no interest in it. But as far as actual title is concerned it is not necessary, yet it is the cautious and careful title companies that insist upon it. Go ahead.

Mrs. Carver: The evidence in this case is uncontradicted as to the ownership of the real property, which is sufficient to overcome the presumption that it is the wife's separate property.

The Referee: Well, what do you think about it, Mr. Tobin?

Mr. Tobin: (Discussion.)

The Referee: I want to take a look at the record of proceedings in this matter.

Mrs. Carver: Your Honor has read the transcript. Do you feel there is nothing further to explain?

The Referee: No. I think it is Judge Yankwich's opinion that the case should come back to him with the testimony of the wife. Let us review this record a moment. This involuntary petition was filed August 22, 1955. Then there was filed a motion by the alleged bankrupt to dismiss the petition. That was filed August 30, 1955 and set for hearing on September 6th, 1955. There was a partial [11] hearing on the morning of September 6th, 1955, and it went over until the afternoon, and the motion to dismiss was granted, with leave to amend. On the same day, September 6th, an amended petition was filed. On October 20th, 1955 a continuance was ordered to November 3d, 1955; and then it was continued to November 4th, 1955, at 2 o'clock. On November 4th it was partially heard and continued to

November 14th. On November 14th it was partially heard and continued to November 21st. On November 21st there was an informal pre-trial conference, and the hearing was continued to December 5th, 1955. It was partially heard on December 5th, and continued to December 6th. On December 6th it was partially heard, and continued to December 8th. On December 8th direction was given to counsel for petitioning creditors to prepare the order of adjudication and ordering the filing of schedules and so forth.

Now, I am making the findings and stating the conclusions, whichever it be—that in addition to not believing Mr. Collins I do not believe Mrs. Collins' testimony. First of all, I think the testimony of both Mr. and Mrs. Collins with respect to the real property is entirely self-serving and it is tailored to fit this particular situation in which Mr. John Collins finds himself; if the situation were otherwise the testimony would be otherwise [12] by both Mr. and Mrs. Collins.

I repeat that what they are trying to convince the court is that Mr. Collins has an interest in a piece of property but it is a property that his creditors cannot reach.

The reason I took the time to read this record of proceedings is to recall the length of time that went by during which this matter was before the Court. It is true that we are dealing at this moment only with a fragmentary part of the whole situation—we are dealing here with real estate. There are a lot of other angles, and they took time.

I have not the slightest doubt that at some stage during these proceedings Mrs. Collins was very seriously ill; but when it came to the real estate her testimony was a vital factor; and no explanation has as yet been offered as to why some effort was not made to get her testimony into the record at that time. I say that I have no doubt that she was very ill.

Mrs. Carver: May I be heard on that?

The Referee: In just a minute. I don't doubt but what she was very ill, but we took quite a lot of time in this case. It was not until December 8, 1955 that we finally concluded it.

Now, maybe this is entirely out of line, but I thought that this Referee had established the reputation [13] in this Court of being willing to accommodate himself to the necessities of any situation. And I know that if a request had been made that this Court would have adjourned the hearing to the bedside of Mrs. Collins and the reporter would have gone along, together with counsel and everybody else. If Mrs. Carver has got some explanation, that is one phase of it that I did not then understand and I do not understand now.

Mrs. Carver: I do have an explanation.

The Referee: In just a minute. It is true that there is something in the transcript about assuming that Mrs. Collins' testimony would be the same. It may be that counsel may have been misled by that. Now what do you wish to say?

Mrs. Carver: I want to say this, your Honor: that during the greater part of these hearings in

this case, while it was actually being tried, Mrs. Collins sat in this court room on four different occasions. She did not get a chance to go on—there were other witnesses who were taken each time. On the day that this matter did come up that Mr. Collins testified as to the real property, Mrs. Collins was in an oxygen tent in the Hollywood Hospital. She was critically ill with virus pneumonia. She was at the hospital from right after Thanksgiving until the 10th of December. I requested the Court—I said, “I must, when I am able, produce Mrs. Collins; and your response [14] in the record was that you would assume—I don’t know the exact words—but that was in response to my statement that we would like to produce Mrs. Collins. She was not out because she was ill.

The Referee: All right. So that there will be no doubt about it, let us eliminate that entirely from consideration, and let us not give any effect at all to the fact that she was not produced as a witness at the initial hearings. Let us take it simply where it is today—her testimony here today. I cannot believe it because, as I say, it is just self-serving. Naturally, as the wife of John Collins, the interest of John Collins is her interest; and she does not want him adjudged a bankrupt any more than he wants to be adjudged a bankrupt.

Now, it is that kind of testimony upon which the Court is asked to say that the deed to property does not imply what a bona fide purchaser would be entitled to assume from it, namely, that she was the sole owner of the property, that it was her separate

property, and that she had a right to deal with it without a concurrence of her husband.

I repeat that I am taking the whole record in the case and the fact, among others, that Mr. Collins insists on giving away something that would be of value to himself or his creditors. Mrs. Carver says, "Well, he thought there was no value there, it was going to expire." Then he [15] found out differently. He found out even after this case had started that there was a substantial value there and still he does nothing. If he had come to this Court or had come to the petitioning creditors after the case had started and said "I was mistaken, I didn't think this would be of any value to me; now I am going to do everything in my power to get this back from this man that I am giving it to", then Mr. Collins would stand before the Court in an entirely different light so far as credibility is concerned.

So far as Mrs. Collins is concerned, the Court simply has to find that she is going along with her husband; and if the situation were different, then, too, she would go along with him in whatever it might seem to require.

All right. Mr. Tobin, you may prepare the necessary papers. I suppose that it means another review, does it not, Mrs. Carver, or does it automatically go back?

Mrs. Carver: It automatically goes back. The review is still pending before Judge Yankwich.

Mr. Tobin: It is merely a remanding, without a reversal. I imagine there will have to be additional findings.

The Referee: You may make such additional findings, after hearing the testimony of Mrs. Collins. I think it would be helpful if you would yourself re-read Judge Yankwich's comments. [16]

Mr. Tobin: I will.

The Referee: So that you will incorporate the things that he thinks the Referee should put in.

Mr. Tobin: Yes, your Honor.

The Referee: Of course, I am not going to leave it to you to put words into the Referee's mouth. I will read it and if not satisfied I will alter it. [17]

[Endorsed]: Filed March 27, 1956.

[Endorsed]: No. 15234. United States Court of Appeals for the Ninth Circuit. Acme Distributing Company, California Beverage & Supply Co., and Young's Market Company, Appellants, vs. John Collins, doing business as Stan's Stage Coach Stop, alleged bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: August 17, 1956.

Docketed: August 21, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15234

In the Matter of JOHN COLLINS, dba STAN'S
STAGE COACH STOP, Bankrupt,

ADOPTION BY APPELLANTS OF POINTS
ON WHICH APPELLANTS INTEND TO
RELY AS FILED IN THE DISTRICT
COURT

To the Honorable United States Court of Appeals
for the Ninth Circuit:

The petitioning creditors, appellants herein,
hereby adopt as their points on which they intend
to rely on appeal, the points as specified in the Dis-
trict Court.

Dated this 20th day of August, 1956.

CRAIG, WELLER & LAUGHARN,
/s/ By THOMAS S. TOBIN,
Attorneys for Appellants

[Endorsed]: Filed Aug. 21, 1956. Paul P.
O'Brien, Clerk.

No. 15234

United States
Court of Appeals
for the Ninth Circuit

ACME DISTRIBUTING COMPANY, CALI-
FORNIA BEVERAGE & SUPPLY CO., and
YOUNG'S MARKET COMPANY,

Appellants,

vs.

JOHN COLLINS, Doing Business as Stan's Stage
Coach Stop, Alleged Bankrupt,

Appellee.

Supplemental
Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILE

APR - 5 1957

PAUL P. O'BRIEN,

No. 15234

United States
Court of Appeals
for the Ninth Circuit

ACME DISTRIBUTING COMPANY, CALI-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, Southern
District of California, Central Division

No. 67977-Y

In the Matter of:

JOHN COLLINS, Doing Business as Stan's Stage
Coach Stop,

Alleged Bankrupt.

STIPULATION

It appearing that the Reporter's Transcript of Testimony of Temperance Bailey (December 5, 1955) filed in the within proceedings on January 18, 1956, has not been certified as part of the record on review in the within proceeding, and it

Further appearing that said transcript and the testimony contained therein was considered by the Honorable Leon R. Yankwich, District Judge, upon the hearing on the Petition for Review of the Order Adjudging the alleged bankrupt a bankrupt, now, therefore,

It Is Hereby Stipulated by and between the alleged bankrupt above-named and the petitioning creditors on the creditors' involuntary petition herein that an order may be made and entered herein directing the Honorable Benno M. Brink, Referee in Bankruptcy, to certify up as part of the record on review that certain transcript, to wit, Reporter's Transcript of Testimony of Temperance Bailey (December 5, 1955), filed in the office of said Ref-

eree on January 18, 1956, and that said transcript be included as part of the record on review, and that the clerk of this court certify the same as a supplement to and part of the record on appeal to the United States Court of Appeals for the Ninth Circuit, in Case No. 15234, entitled "Acme Distributing Company, California Beverage & Supply Co., and Young's Market Company, Appellants, vs. John Collins, doing business as Stan's Stage Coach Stop, alleged bankrupt, Appellee."

Dated this 4th day of March, 1957.

GRAINGER, CARVER AND
GRAINGER,
PATRICIA HOFSTETTER,

By /s/ A. O. CARVER,
Attorneys for Alleged
Bankrupt.

CRAIG WELLER &
LAUGHARN,

By /s/ THOMAS S. TOBIN,
Attorneys for Petitioning
Creditors.

[Endorsed]: Filed March 4, 1957.

[Title of District Court and Cause.]

ORDER DIRECTING REFEREE TO CERTIFY
UP AS PART OF RECORD ON REVIEW
CERTAIN TRANSCRIPT, AND DIRECT-
ING CLERK OF COURT TO CERTIFY
SAME AS SUPPLEMENT TO RECORD
ON APPEAL

Upon stipulation of the Alleged Bankrupt above-named and the petitioning creditors on the Creditors' Involuntary Petition in Bankruptcy herein, and good cause appearing therefor, and it appearing that the transcript and the testimony of Temperance Bailey contained therein taken December 5, 1955, were considered by the Court upon the hearing on the Petition for Review of the Order Adjudging the alleged bankrupt a bankrupt, now, therefore, no adverse interests appearing,

It Is Ordered that Benno M. Brink, Referee in Bankruptcy herein, be, and he hereby is directed to certify up as part of the record on review herein that certain transcript, to wit, Reporter's Transcript of Testimony of Temperance Bailey taken December 5, 1955, filed in his clerk's office on January 18, 1956.

It Is Further Ordered that upon such certification that said transcript be included as part of the record on review, and John A. Childress, clerk of this court, certify the same as a supplement to and part of the record on appeal to the United States Court of Appeals for the Ninth Circuit, in Case No.

15234, entitled "Acme Distributing Company, California Beverage & Supply Co., and Young's Market Company, Appellants, vs. John Collins, doing business as Stan's Stage Coach Stop, alleged bankrupt, appellee."

Dated this 4th day of March, 1957.

/s/ LEON R. YANKWICH,
District Judge.

[Endorsed]: Filed March 4, 1957.

[Title of District Court and Cause.]

SUPPLEMENT TO REFEREE'S CERTIFICATE
ON PETITION FOR REVIEW OF
ORDER OF ADJUDICATION

To the Honorable Leon R. Yankwich, Judge of the
above-entitled Court:

Pursuant to the Order made in the above-mentioned proceeding on March 4, 1957, I, Benno M. Brink, one of the Referees in Bankruptcy of said Court, before whom the above-entitled matter is pending under an order of general reference, do hereby supplement my Referee's Certificate on Petition for Review of Order of Adjudication which I filed on January 6, 1956, by transmitting herewith the Reporter's Transcript of Testimony of Temperance Bailey taken December 5, 1955, and which Transcript was filed on January 18, 1956.

Respectfully submitted this 5th day of March,
1957.

/s/ BENNO M. BRINK,
Referee in Bankruptcy.

[Endorsed]: Filed March 5, 1957.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF TESTIMONY
OF TEMPERANCE BAILEY, DECEMBER
5, 1955

TEMPERANCE BAILEY

being first duly sworn, testified as follows:

Examination

By Mrs. Carver:

Q. In December, 1951, were you connected with
the Bank of America in Whittier? A. Yes.

Q. What was your business at that time?

A. Escrow officer.

Q. As escrow officer did you have charge of
Escrow No. 18621? A. I did.

Q. That is an escrow in which real property
was purchased and title taken in the name of Ada
J. Collins? A. Yes.

Q. In connection with the escrow that you han-
dled at your bank, what is the procedure in the bank
as to property that is taken as separate property,
of either husband or wife?

The Referee: I do not see how that is competent.

Mrs. Carver: I want to show what was done.

The Referee: You may go into this particular transaction, but what the custom or policy of the bank is is immaterial.

Q. (By Mrs. Carver): At the time the escrow was opened did you have any conversation with Mr. Collins as to this particular escrow?

Mr. Tobin: Objected to, lack of foundation.

The Referee: I think you may ask further questions.

Q. (By Mrs. Carver): Do you recall any conversation that you had with Mr. Collins at or about the time that this escrow was to be opened? [2*]

Mr. Tobin: Objected to; not binding on the petitioning creditors; hearsay.

The Referee: Objection overruled. You may answer whether you had a conversation with Mr. Collins.

A. I don't recall.

Q. (By Mrs. Carver): Do you recall having had any conversation during the pendency of the escrow with Mr. Collins?

A. This was in 1951, and I couldn't remember.

The Referee: Mrs. Bailey, you do not have to explain. We know you are a busy woman. Sometimes people in your capacity do happen to remember something about a particular transaction.

A. I don't recall any conversation.

Q. (By Mrs. Carver): In connection with this escrow, did Mr. Collins ever sign a statement required by the bank, investing title to the property?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Referee: You are asking whether or not she has in her papers, in the escrow, any statement signed by Mr. Collins. Do you have in the escrow a statement of any kind by John Collins?

A. There is nothing in the file which has John Collins' signature on it.

Q. (By Mrs. Carver): In investing title to property, to either spouse, separate property, both parties have to sign a request—is that right? [3]

Mr. Tobin: Objected to; incompetent; calling for a legal conclusion; hearsay; not binding on the petitioning creditors.

The Referee: Objection overruled, because this is an effort, apparently, to locate a paper which counsel for Mr. Collins believes might be in this file. Is there any possibility, Mrs. Bailey, that any paper that was used in this file is not now in the file?

Mrs. Carver: May I interrupt? It is to show there was no such paper signed—which is a necessary paper. It was a matter of vesting title.

The Referee: I don't understand it. Will you please explain?

Mrs. Carver: It is my understanding that before the bank, or title company, would issue a title to property as one spouse's separate property, each spouse must sign, that it is the intention that it is to be separate property; and the bank, acting as escrow, requires that statement before they will vest the title.

The Referee: If you are talking about the policy of title insurance and not about the escrow—the pol-

icy is not issued by the escrow holder. How does the policy show?

Mrs. Carver: The policy shows the same as the deed.

The Referee: Have you got the policy of title insurance?

Mrs. Carver: I imagine the holder of the incumbrance [4] has the policy.

The Referee: Let us see whether or not we could ask her any question that would be competent and material. Mrs. Bailey, you do have occasions in your business to request a title company to issue a policy of title insurance on property which is passing through your escrow, is that not the fact?

A. Yes.

Q. You do have occasions where property is requested to be vested in a married woman as her separate property—you do have those situations?

A. Yes.

Q. When you request a policy of title insurance in that kind of a situation—where the title is to be vested in a married woman as separate property, do you transmit to the title company any papers in addition to the deed?

A. The deed would contain a clause that it was to be—was deeded to the one, the grantee, the property to be the separate property; but there would be an agreement deed, signed by husband and wife that it was to be the separate property of the grantee.

Q. In other words, your custom, then, would be that the husband would sign on the deed itself?

A. Yes; either that or a quitclaim deed, in a separate instrument.

Q. The husband would execute a quitclaim deed?

A. It would be embodied in the instructions. [5]

The Referee: Now, we have the instrument here, as Petitioning Creditors' Exhibit No. 8; and the Court finds nothing with respect to the vesting of the title. You say it would be right on this instrument?

A. Yes.

The Referee: Is there anything else?

Mrs. Carver: That is all.

Mr. Tobin: No cross-examination.

(Witness excused.) [6]

I, Arthur J. Hughes, shorthand reporter, do hereby certify that on the 5th day of December, 1955, I reported in shorthand the proceedings had and testimony taken of Temperance Bailey, before Hon. Benno M. Brink, Referee in Bankruptcy; that thereafter I reduced to typewriting said matter; and that the foregoing pages are a full, true and correct transcript of such.

Dated January 16, 1956.

/s/ ARTHUR J. HUGHES.

[Endorsed]: Filed January 18, 1956. [7]

[Endorsed]: No. 15234. United States Court of Appeals for the Ninth Circuit. Acme Distributing Company, California Beverage & Supply Co., and Young's Market Company, Appellants, vs. John Collins, Doing Business as Stan's Stage Coach Stop, Alleged Bankrupt, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 20, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 15234

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ACME DISTRIBUTING COMPANY, CALIFORNIA BEVERAGE
& SUPPLY Co., and YOUNG'S MARKET COMPANY,

Appellants,

vs.

JOHN COLLINS, doing business as Stan's Stage Coach
Stop, alleged bankrupt,

Appellee.

OPENING BRIEF OF APPELLANTS.

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FILED

FEB 15 1957

PAUL H. MURPHY, CLERK

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IN THE
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Stop, alleged bankrupt,
Appellee.

OPENING BRIEF OF APPELLANTS.

This is an appeal from an order of Judge Leon R. Yankwich, United States District Judge for the Southern District of California, in which he reversed an order of Referee Benno M. Brink who on two separate and distinct occasions had adjudicated John Collins to be a bankrupt.

On review taken the first time from the original order of adjudication on the plea that the bankrupt wanted an opportunity to present his wife who allegedly was sick in the hospital on the last day of the trial before Referee Brink, Judge Yankwich remanded the matter to the Referee to take the wife's testimony and the testimony of

such other witnesses as might be offered as to the circumstances under which the title of the real property then standing of record in the name of the wife of the bankrupt was carried, and instructed the Referee to make such changes as he might desire in the findings to the court and make the same, or such other ruling as he might deem proper. [Tr. p. 22.]

Upon remand, the Referee reopened the matter on March 14, 1956, and took the testimony of Mrs. Collins. [Tr. p. 281, *et seq.*] After hearing Mrs. Collins' testimony, the Referee still remained unconvinced that title to the home occupied by the bankrupt and his wife, on which there was a homestead declaration, was taken in the name of the wife only for the sole purpose of convenience, and he was convinced that if the property were vulnerable to attack by the trustee, in the absence of a homestead declaration filed before bankruptcy, the bankrupt and his wife would not have insisted that this exempt homestead was community property as contended by them.

Referee Brink reiterated his former findings.

A second review was taken by the bankrupt and this time Judge Yankwich reversed Referee Brink entirely, filing a memorandum opinion which is found in the Transcript, page 26b, and made new findings, conclusions of law and order decreeing Collins not to be a bankrupt and reversing the former order of the Referee. [Tr. pp. 36-40, incl.] From that order the petitioning creditors have taken this appeal.

The Jurisdiction.

The jurisdiction of the United States District Court was invoked under the provisions of Section 4b of the National Bankruptcy Act (11 U. S. C. A., Sec. 22), which provides that any natural person, except a wage earner or farmer, and any moneyed, business, or commercial corporation, except a building and loan association, a municipality, railroad, insurance or banking corporation, owing debts to the amount of \$1,000.00 or over, may be adjudged an involuntary bankrupt upon default or an impartial trial and shall be subject to the provisions and entitled to the benefits of this Act.

The act of bankruptcy invoked against this bankrupt was what is commonly known as the first act of bankruptcy which consists of the bankrupt having

“concealed, removed or permitted to be concealed or removed any part of his property with intent to hinder, delay or defraud his creditors, or any of them, or made or suffered a transfer of any of his property, fraudulent under the provisions of section 67 or 70 of this Act.” (11 U. S. C. A., Secs. 3a and 106d(5).)

The act of making the transfer without any consideration as in this case in the face of creditors' claims placed the burden on the bankrupt to prove that he was solvent. (Bank. Act, Sec. 3c; 11 U. S. C. A., Sec. 21c.)

The jurisdiction of the District Court on review was invoked under Section 39c of the National Bankruptcy Act (11 U. S. C. A., Sec. 67c).

The jurisdiction of this court is invoked on appeal under the provisions of Section 24a and b of the National Bankruptcy Act (11 U. S. C. A., Sec. 47a and b).

The History of the Case.

John Collins and his wife were formerly residents of Niagara Falls, New York. [Tr. p. 48.] They had a bank account in Niagara Falls out of which they had made their last substantial withdrawal about 1953. The bank accounts were scattered in several different banks in Niagara Falls and consisted, so the bankrupt believed, of checking accounts. [Tr. pp. 48, 49 and 50.] The bankrupt engaged in the business of a cafe and cocktail lounge up until about September, 1954. [Tr. p. 45.] He had a dispute with an associate Stan Lefringhouse whose status was in dispute throughout the trial as to whether or not he was a partner of Collins, or merely a manager of the retail liquor business. [Tr. p. 45.] When this dispute ensued, Collins took a part of the liquor which was in the cafe out to his home and put it in his garage. This approximated fifty or sixty bottles, or possibly thirty or forty, but the bankrupt could not tell us exactly how many, when examined under Section 21a at the time the receiver was trying to round up any property which the bankrupt had. [See Tr. p. 46.] Some of it was served at parties given in Collins' home, and some was given away as Christmas presents, and the balance was either drunk by Collins or left in the garage. [Tr. p. 47.] He could not give us a figure on September 6, 1955, as to the value of the liquor he had on hand when the receiver was trying to round up his property, but placed it somewhere in the vicinity of \$400.00 or \$500.00. [Tr. p. 47.]

He had moved to California in October, 1951, coming from Niagara Falls, New York. [Tr. p. 48.] In September or October, 1951, his wife bought a new car, a 1951 Chrysler. [Tr. pp. 52, 53.] Title to this car was taken in the wife's name. The bankrupt had intended to buy his wife a cheap car, but her father said he would

put in the extra money to buy her a good car. [Tr. p. 54.] The wife claimed this car belonged to her and it was encumbered, in addition. [Tr. pp. 53-54.]

The bankrupt's father had died about eighteen months prior to September 6, 1955, and had left a home in Niagara Falls, New York, to the bankrupt's mother apparently, according to the bankrupt's version, a life estate vesting in his mother with the remainder to be divided between the bankrupt and the "kids" upon her death. [Tr. p. 55.]

The home in which the bankrupt lived in this state stood in the name of his wife. [Tr. p. 56.] (Apparently the reporter misunderstood the pronunciation of the wife's name and reported it as "Eda J. Collins.") Her correct name is Ada J. Collins. The bankrupt testified, at the time when the receiver was seeking to round up his assets, *that his wife claimed this home property as her own.* [Tr. p. 56.] The evidence does not indicate that at that time he was claiming any interest in the property. Later on, when it became a material element in determining whether or not he was solvent, at the date of the fraudulent transfer of his liquor license to a friend, he changed his story to contend that the property was community property instead of his wife's separate property.

The Pleadings.

As hereinbefore stated, the involuntary petition filed on September 8, 1955, alleged that the bankrupt was indebted to the Acme Distributing Company in the sum of \$417.00; California Beverage & Supply Co. in the sum of \$955.00, and Young's Market Company in the sum of \$242.07, and that within four months immediately preceding the filing of the petition, the bankrupt had made or suffered a transfer of his property, fraudulent under the provisions of

Sections 67 and 70 of the National Bankruptcy Act by causing a transfer of his Distilled Spirits License to one Fred De Carlo, without any consideration, thereby rendering himself insolvent; that the liquor license was worth between \$4,500.00 and \$5,000.00 and that he had placed it beyond his control to such an extent that neither he nor a bona fide purchaser from him could obtain greater rights in said liquor license than the said Fred De Carlo. [Tr. pp. 4-10, incl.] In reply to his petition, the bankrupt filed a verified answer in which he expressly denied allegation No. III that he owed any of the bills set forth by the petitioning creditors in their involuntary petition. The undisputed testimony of W. J. Ryan of the Acme Distributing Co. of Pasadena [Tr. pp. 63-65], Charles A. Wright of the California Beverage & Supply Co. [Tr. pp. 65-68], and J. Walter Phelps of Young's Market Company [Tr. pp. 68-70], demonstrated the untruthfulness of this bankrupt's denial and first shook the Referee's faith in his credibility. He owed the amounts claimed to all three of these petitioning creditors. [Finding No. 2, Tr. p. 15.]

The value of the liquor license in question was indisputably established by the testimony of Ralph Meyers, an experienced liquidator, at between \$4,500.00 and \$5,000.00. [Tr. p. 71.] The liaison officer between the Department of Alcoholic Beverage Control and the Board of Equalization, Roscoe Z. Matthews, testified that the proceedings involving the transfer had so far progressed that the license could not go back to the bankrupt because he decided that he wanted to rescind. (11 U. S. C. A., Sec. 106d(5).) The bankrupt admitted that he had made an application to transfer the liquor license to Fred De Carlo and that Fred De Carlo was paying nothing for the transfer to him. [Tr. pp. 78, 79.] The bankrupt

was not able to enlighten us as to his opinion as to the value of the license [Tr. p. 79], so the testimony of Ralph Meyers that it was worth between \$4,500.00 and \$5,000.00 stands uncontradicted. At that point, counsel for the bankrupt handed counsel for the petitioning creditors a statement of the bankrupt's assets and liabilities in which there was included a home described as Lot 19, Tract 16868 valued at \$15,000.00 and which *stood in the name of his wife*. [Tr. p. 79.] Included in this list of assets and liabilities was \$1,500.00 in cash which the bankrupt claimed he had at the time of the transfer of the liquor license, August 4, 1955. [Tr. p. 79.] He admitted that at the date of the filing of the involuntary petition, the home stood in his wife's name. He also testified that he had approximately \$1,500.00 in his possession on or about August 2, 1955, when William A. Wylie was appointed receiver for his estate under the provisions of Section 2a, subdivision (3) of the National Bankruptcy Act (11 U. S. C. A., Sec. 2a(3).) He did not tell the receiver about this alleged \$1,500.00 which he claimed he had in his personal possession at that time. He attempted to evade answering this question directly on the ground that he had never seen Mr. Wylie, the receiver, and that one of Mr. Wylie's representatives had called on him only about three days before he was examined on November 4, 1955. [Tr. pp. 80, 81.] This evasive testimony was belied by the testimony of Harold Harris, agent for William A. Wylie, the receiver, which is found at page 118, *et seq.*, of the Transcript. Harris testified that he contacted the bankrupt at his home shortly after Wylie was appointed receiver in the bankruptcy proceeding; that he had made an inventory of the stock of liquor which he had stored out there at his home, and that he had asked Mr. Collins if there were any other assets any other place and that

Collins denied that there were. [Tr. p. 119.] Harris was asked this question:

“Q. Did he tell you he had cash in his possession consisting of uncashed compensation checks in the sum of \$1500? A. No, sir.

* * * * *

Q. Did he tell you he had an unliquidated claim against Davis Piping and Ream Manufacturing Company, on which he had been offered a settlement of \$3500? A. No.”

The evasive denial of contact with the receiver up until three days before the trial, was explained very completely by Mr. Harris on Cross-examination. [Tr. p. 119.] About five weeks before the trial Harris had contacted Collins on the telephone. He had spoken to him at various times up until the Saturday preceding the trial when he had taken the inventory of Collins’ liquor. [Tr. p. 119.] At page 120 of the transcript, Harris reiterated:

“A. I asked him: Are there any other assets that I should know about?”

Further at page 121 of the Transcript, Harris testified as to his efforts to appraise the household goods of the bankrupt, listed as an asset, at his home at 10423 Townley Drive, Whittier. He was unable to gain access to the bankrupt’s home, although he and Walter Stern, a witness who testified at page 127, *et seq.*, of the Transcript, repeatedly rang the bell at the bankrupt’s home, and after remaining there an hour and fifteen minutes without an answer, left. He again attempted to contact the bankrupt on November 15th by telephone with no success. [Tr. p. 121.] On November 12th he had talked to a little girl on the telephone, but did not get to talk to the bankrupt. He tried to get him again the morning of the trial at

7:45, and the same little girl answered the telephone and said her father was not at home. Harris had no chance to talk to him on that occasion. [Tr. pp. 121, 122.]

He had, however, made an inventory of the stock of liquor which the bankrupt was keeping in his garage. The greater percentage of the liquor bottles were open. [Tr. p. 122.]

The value placed on the stock of whiskey found in the bankrupt's garage by Harris was about \$500.00. [Tr. p. 119.] The meticulous way in which Harris took this inventory is demonstrated by the fact that he even broke down the bottles which were open, into decimals of tenths. For example, he listed one item of D.O.M. liquor (Benedictine) as 9/10 of a quart, and on the page immediately preceding were some bottles that were marked "3/10."

The elusive conduct of this bankrupt was further demonstrated by the testimony of Walter F. Stern which begins at page 127 of the Transcript. Stern had been an adjuster for the Credit Managers Association of Southern California for over thirty-two years. He had had occasion to handle stocks of all kinds. He was familiar with the value of cars and of liquors. Pursuant to request from the office of counsel for the petitioning creditors, he met the receiver's agent, Harold Harris, at the home of the bankrupt on November 11th, arriving there at approximately 8 o'clock in the morning. [Tr. p. 127.] Standing in the driveway of the place where he met Harris was a Ford car. A blonde young man came out of the house, opened the door of the Ford, took out some pieces of mechanism, and went out to the curb where there was a Chrysler convertible and put the pieces of mechanism in the passenger compartment of the Chrysler. [Tr. p. 128.] The front part of the Ford was jacked up and the drive shaft was down on the concrete.

It certainly is puzzling why Harris was unable to gain entrance to the bankrupt's home after waiting an hour and fifteen minutes and repeatedly ringing the door bell [Tr. p. 121] when it is clearly evident that there was some one at home who came out the back door and removed part of the mechanism of the Ford and put it in the Chrysler. Were it not for this testimony, one might be left to speculate as to whether the door bell was not answered because no one was home, but it is clearly evident from the testimony of Stern that there was at least a young fellow in the house who for some reason or other took parts of the Ford jacked up in the driveway and placed it in another car.

Another item of assets which the bankrupt claimed in his list of assets and liabilities prepared for use at the time of the trial were 1,000 phonograph records which he valued at \$1.00 apiece, or \$1,000.00. Walter Stern testified that these phonograph records were worth about 5¢ each. As we will point out later, the bankrupt was closely allied with the juke box business [Tr. pp. 107-108] and his valuation of his phonograph records was decidedly inflated, to put it mildly.

In his list of assets he put in his furniture at cost \$4,000.00, which he had bought in 1952, 1953 and 1954. Stern testified that the furniture purchased two years ago at a cost of \$4,000.00 would not be worth \$1,000.00 today (the date of the beginning of the trial, or the preceding August, the date of the filing of the petition).

Included among the other "assets" the bankrupt put in an unliquidated claim for \$3,500.00, which he claimed was a compensation claim, but was unliquidated and disputed. [Tr. p. 81.] That this claim was most decidedly disputed and denied by the insurer is evidenced by the testimony of Lloyd D. Crayne. [Tr. pp. 131-135, incl.]

Another alleged asset claimed by the bankrupt in the list was the cash surrender value of insurance policies roughly around \$1,700.00, a claim for damages in connection with an injury to his son which was unliquidated, hand tools which he valued at \$1,000.00 consisting of wrenches, saws, power tools, an electric saw, a metal cutter and other things that he used in his trade as a steam fitter [Tr. p. 82]; an interest in money held in escrow in the Vista Escrow Company in the amount of \$3,000.00 [Tr. p. 83]; fixtures in Norwalk which he listed at \$7,000.00 [Tr. p. 85]; and a claim against Stanley E. Lefringhouse of \$2,300.00 which Lefringhouse vigorously denied owing him [Tr. pp. 100, 101] and certain accounts receivable listed and handed to counsel for the petitioning creditors [Tr. p. 115], which contained no addresses of the debtors and was received in evidence as Petitioning Creditors' Exhibit 3. [Tr. p. 116.]

The \$3,000.00 in escrow which Collins claimed as an asset evaporated speedily when the escrow papers were produced and it was stipulated by counsel for both sides that the amount in the escrow at the date of the trial was only \$123.08 instead of \$3,000.00 as claimed by the bankrupt.

The accounts receivable likewise deteriorated rapidly. They consisted of names and amounts written on a sheet of paper with no addresses. A fair sample of their collectibility is evidenced by the bankrupt's examination at page 136, *et seq.*, of the record For instance: "Bill's check, \$16.50." Bankrupt doesn't know his address. The only information he could give us about it was [Tr. p. 137] "I got a check from a 'Bill' \$16.50. It was a check he gave me and I took it to the bank. It was money I loaned him out of my pocket outside of the bar." [Tr. pp. 137, 138.] "Dutch" listed at \$77.45, was a man who

came in the bar and constituted a bar bill at the Schooner Cafe. Bankrupt did not know where he lived except it was in the 4300 block on Olive Street. "Clete" was another fellow who was at the bar. "Shorty Sharpe" \$37.05, lived close to the bar. Part of the account receivable was cash and part a bar bill. "T. A. Sharpe" was a brother of "Shorty Sharpe," "Lloyd" \$100.00 was for a paycheck which he had cashed for him at the bar. He lives on Florence Place somewhere, on the corner of Florence Place. There are some motels there, and he lives right next to them. "Nolan" \$10.50, lives at Bell Gardens. That was a bar bill. "Paul" \$1.55, he used to clean the place—clean up around there. "Spohn" \$10.25, is a man who sells Mercury-Lincoln automobiles. Bankrupt did not know where he lived, but saw him once in a while. "Smitty"—bankrupt could not tell where he lived. "Jimmy & Cliff" \$2.85, a bar bill. "Bart," the man's last name. [Tr. pp. 136-140, incl.]

The bankrupt had listed this silly list of accounts receivable at \$2,200.00 as an asset. Asked on page 139 of the record what he would believe they were actually worth as the owner thereof, he lamely answered at page 140:

"A. If you collect them all they are worth \$2,200.00."

Questioned further at page 140 about one of the debtors named "Tex" \$27.55, the only way the receiver or the bankrupt could locate him would be to go out and look for him, or wait until some time when the bankrupt saw him and asked him for it. The bankrupt testified that that was about the way he would collect those bills. [Tr. p. 140.]

We next went into the uncashed compensation checks which we demanded that he produce in court at the ad-

journe hearing on November 14, 1955. He had listed these as an asset amounting to \$1,500.00. [Tr. p. 141.] To our surprise, he produced none of them. He testified that he had cashed them. [Tr. p. 151.] He was questioned as to how many of these checks he had in his possession on August 22nd, the date of bankruptcy, and he admitted that he could not tell us. [Tr. p. 141.] This, notwithstanding the fact that he had called Mr. Weller, one of the attorneys for the petitioning creditors, and very obligingly told him that he would be at home to receive the service of the involuntary petition about the 25th of August, three days after the petition was filed. [Tr. pp. 141, 142.] Pressed further, he was asked:

“Now, at the time you had your conversation with the United States Marshal and with Mr. Weller, did you have in your possession uncashed compensation checks of the value of \$1,500.00? A. I doubt that very much.” [Tr. p. 142.]

If he had \$1,500.00 in uncashed compensation checks in his possession at the date of bankruptcy, it was his duty to so inform his receiver, but as we have heretofore demonstrated, he did not do so. He listed them as an asset when the case came to trial, and when demand was made that he produce them, he could not do so because he had cashed them.

At this point, it might not be inappropriate to diverge for a moment to quote from the opinion of the late Judge Benjamin F. Bledsoe in the matter of *Jacobson & Ber-*
man, 298 Fed. 542 at 544:

“His admission that, without authority, in a secretive manner, and without the knowledge of his partner, he appropriated sums approximating \$40,000 of the partnership funds, wherewith to go to Tia Juana, Mexico, and other places, and play and lose the same

upon the races and other forms of gambling, is sufficient in itself to destroy any vestige of integrity that might ordinarily attach to his statements, and justify the court in declining to believe any part of his extraordinary tale. An honest man would not do the things that he did. His admission that he did do them is an admission that he is dishonest. Being dishonest, his testimony may not be relied upon or accepted. In addition to that, the testimony of his partner and other witnesses in no wise serves, in my judgment, to corroborate his lurid tale. I am confident that the referee was entirely right in declining to be bound by it merely because it was proffered under oath."

At page 147 of the Transcript, he testified that on the day he went to the hospital he gave his wife their life savings "he would say to live on while he was in the hospital because he figured he could be in there about fifteen weeks." He testified that he kept his life savings at home; that they were not deposited in any bank; that they were in the form of currency and kept in a paper envelope, and that he went to the hospital on June 10 or 11, 1955. This was approximately three months before the date of bankruptcy. He had filed the application for the transfer of the liquor license on August 5, 1955.

We then came to the two cars which he claimed as an asset. One of them was a 1951 Chrysler, and the other a 1952 Ford. [Tr. p. 148.] He valued the Ford at \$600.00. [Tr. p. 149.] However, he admitted at page 148 that it was jacked up, but tried to avoid the damage contained in his answer which corroborated the testimony of Walter Stern by saying:

"However, I did not see it jacked up, or I did not see it in the driveway." [Tr. p. 148.]

The next asset was a claim for damages against the All State Insurance Company, apparently the insurance carrier for some man who had injured his son while driving an automobile. This alleged asset was unliquidated and was in litigation. [Tr. p. 149.] At least, he believed he had a suit filed as guardian for the boy on the boy's behalf. [Tr. p. 150.] He put this claim in his list of assets at \$400.00, and claimed that the driver of the car had run the boy down, that they had to take him to the hospital in an ambulance, and smashed up his bicycle, and that he had to have a doctor, and various bills of that nature. [Tr. p. 150.] There is nothing in the testimony to indicate whether the driver of the car was at fault, or whether the boy had smashed into the car with his bicycle. Yet, Collins claimed this as an "asset."

At page 151 of the Transcript, he described the small hand tools, the vise, and the cut-off saw which would be exempt, but which he claimed as an asset.

We have heretofore touched on the relationship between the bankrupt and Stanley Lefringhouse as being an uncertain relationship. At page 152 of the Transcript, he testified that Lefringhouse was the manager of the business and testified that he and Lefringhouse were the owners thereof. Lefringhouse, on the other hand, claimed the exclusive ownership of the equipment in the place of business and stated that it would not bring in over \$1,000.00 to \$1,500.00 under the hammer. [Tr. p. 191.] At page 188, Lefringhouse denied that Collins owned anything in the place of business at 13113 South San Antonio, Nowalk. At page 189, he testified that he did not know what had become of the glassware which was in the bar and that the first he ever heard Collins mention glassware was at the hearing on the contested adju-

dication. [Tr. p. 189.] He testified that Collins had gone into the place of business when he, Lefringhouse, was not there, took the license, took the liquor, and then came back the next day, and after he got in there Lefringhouse knew that Collins was taking the liquor and did not stop it. He said that Collins did not make any inventory or anything at the time that he took the liquor out of the place of business. [Tr. pp. 189 and 190.] When Collins got through there was no liquor left in the place of business.

The witness, Lichtenfeld, who had entered into a deal some time in January, 1954, to purchase the bar, and in connection with which an escrow had been opened with the Vista Escrow Company [Tr. pp. 156-163], had deposited \$3,000.00 in the escrow. Collins had attempted to claim \$3,000.00 in escrow as an asset. After examining the escrow papers (we did not produce Mr. Waltreous of the Vista Escrow Company because he was under subpoena in the Superior Court in Long Beach at the same time) [Tr. p. 134], a stipulation was entered into [Tr. p. 135] that if Waltreous were present, he would testify that there was only \$123.08 in the escrow instead of the \$3,000.00 as Collins claimed. Lichtenfeld denied that he owed the bankrupt, John Collins, the sum of \$3,000.00 as Collins claimed. [Tr. p. 166.]

Both sides rested [Tr. p. 175] and the Referee then thoroughly summed up the problem to date from the bench. He then called for an "in-between" conference for November 21st at which time the insurance policies could be analyzed and any party in interest would have an opportunity to sit in on it, the conference to be held in Referee Brink's court room. This conference was not reported, but on December 5th the hearing was again resumed with

Collins being called under the provisions of Section 21j of the National Bankruptcy Act (11 U. S. C. A., Sec. 44j).

After the interim conference at which the insurance policies were examined, Collins was asked this question [Tr. p. 182]:

“Q. Now, isn't it a fact that most of these insurance policies that you claim a cash surrender value on are policies on somebody else's life? A. They are are policies on my children's lives, if that is what you are referring to.

Q. And you are claiming the cash surrender value on policies on your children's lives? A. Yes. Can't I? I believe I am beneficiary on the major portion of them.”

At page 199 of the Transcript the bankrupt was shown a grant deed dated December 7, 1951, to Ada J. Collins, a married woman, and was asked if that covered the property where he and Mrs. Collins then lived. His answer was:

“A. Yes, it does.”

He denied that he instructed the escrow department handling the transaction for the sale of this property to place the title to the property in the name of Ada J. Collins. Commencing at page 201 of the Transcript, he went into detail on the circumstances surrounding the transaction whereby the home was acquired in his wife's name. We quote [Tr. p. 202]:

“Mrs. Bailey (the escrow officer) said something about community property, and asked me if I knew what it was all about; and she said, ‘If you want to put this property in your wife's name, that is, it is her property and you have nothing to do with it,

you will have to sign off these extra papers they have in the bank, or the title company,' she said, would not issue the title.

I said I did not want it to be her separate property; it came from our life savings, it belonged to all five of us, my wife and three kids. Anyway, she went ahead and my wife signed the paper and made the arrangement with the title company, they insured it on the assumption it was community property.

Well, the question came up after the escrow was over—we had moved in the house, and someone had told us, 'If you live in the State of California they give you a thousand dollars' worth of exemption in your taxes, if you are a Veteran.' And, so, I applied for it—my wife went down and asked about it.

They said, 'You will have to bring the veteran in with you,' because the house was in her name; and so we did,—we went to the place and signed up. I was assuming responsibility for the tax the same as Ada. The house was put in her name for convenience of signing papers in a quick transaction, so that she could move it. They went ahead and grabbed the thousand dollar exemption, and I have been getting it all the time, ever since we got the house."

This testimony is in rather sharp contrast with the testimony given by the bankrupt at the time the receiver was trying to get the property together. He was asked [Tr. p. 56]:

"Q. In whose name is your home standing? A. Ada J. Collins.

Q. Is your name on it? A. No.

Q. Does she claim it as her own property, do you know? A. Well, she says it is. I don't know. We bought it in 1951, when we came here.

* * * * *

Q. Has anyone declared a homestead on the property? A. My wife, I think—I think she did, when *she* bought the house.” (Italics ours.)

At page 216 of the record after the conclusion of the testimony regarding the homestead property, the Referee said:

“The Court concludes that the evidence here presented is not sufficient to overcome the presumption of separate property. You may proceed.”

The rest of the testimony at that hearing pertained to the chaotic deals between Collins, Lefringhouse and Lichtenfeld which were so mixed up that it was clearly evident that any claims which Collins might have against either Lefringhouse or Lichtenfeld were highly debatable and did not constitute an asset.

The trial resumed December 6, 1955. [Tr. p. 235, *et seq.*] Collins' testimony at that hearing pertained to his transactions with Lichtenfeld and Lefringhouse, and to a loan which he had made to one Joseph Kaiser in June of 1954 in the sum of \$960.00 which he likewise claimed as an asset. [Tr. p. 241.] He had no documentary evidence of that loan. [Tr. p. 242.] Kaiser said he would pay Collins back when he made the money on another job. He believed the loan had been made in cash which he had kept in his home and which he did not believe he had on deposit in the bank. [Tr. p. 243.] We believe a trustee in bankruptcy would encounter considerable difficulty in collecting this loan from the mysterious Mr. Kaiser who lived somewhere in Covina or West Covina. [Tr. p. 244.] He then went into the values which he placed on the phonograph records. [Tr. p. 245.] One record by Ernestine Schumann-Heinck he claimed was of the value of \$50.00; another album of thirteen records called the Catholic

Church Record Club, he valued at \$100.00. On cross-examination he was confronted with the fact that at the time he was examined in the bankruptcy court on September 6, 1955, when the receiver was seeking to locate his assets, he had mentioned nothing about the loan which he now said he had made to Mr. Kaiser in June of 1954. He was also confronted with a document, Bankrupt's Exhibit 11, in which it was

"specifically understood and agreed that between the Sellers, Stanley E. Lefringhouse, is the sale (*sic*) of the furniture, fixtures and equipment, goodwill, lease, trade name, inventory, etc., and the only interest John Collins has is the on-sale liquor license, all funds due at the close of escrow herein to the seller shall be paid solely to Stanley E. Lefringhouse with no monetary interest of any nature whatsoever to John Collins." [Tr. pp. 247-248.]

He was asked whether or not he had claimed an interest in the fixtures, equipment, inventory, etc., at the time that he had signed Bankrupt's Exhibit 11, and he gave the same answer:

"A. Yes, it was with the understanding of this \$5,500.00 that Stanley Lefringhouse signed."

Going further into the muddled transactions between the bankrupt and Lefringhouse, he was asked the following questions [Tr. p. 248, *et seq.*]:

"Mr. Tobin: Yes. In what sum did you get the \$2,500.00 of that \$3,500.00 check, a check or cash, or what? A. Well, at first I gave Lefringhouse a check for \$2,500.00. He went to the bank and could not cash it, and I had to go to the bank and cash it and brought the cash to him.

Q. What did you do with the cash? A. I gave it to Stan Lefringhouse.

Q. Do you know a man by the name of Louis Trapini? A. Yes.

Q. What is his occupatoin? A. I believe he was a liquor salesman.

Q. Do you know where he is now? A. I believe he is in Los Angeles.

Q. He is in the penitentiary, is he not? A. I don't believe so.

Q. Is it a fact you gave this \$3,500.00 to Louis Trapini? A. And would I get Stan Lefringhouse's signature?

Q. The question is, did you not give the \$3,500.00 to Louis Trapini in cash? A. That is not true; that is absolutely not true."

Lefringhouse was then called to the stand, commencing at Transcript, page 252. His version of the transaction was set forth as follows [Tr. p. 256]:

"A. I was running a bar in the same place there in 1952; and I had gone down to the State Board many times, to try to get a liquor license; and each time I would go down they would say, 'We are not issuing them; put in your name on the list.' John (Collins) and Larry (Collins) were in this juke box business and they came to me and they said they could get a license for \$3,500.00, and they would get it for me, and I would pay them \$5,500.00 back, with a note of \$150.00 a month. And, so what happened, John Collins wanted Larry Collins to go down with me to the Bohemian Distributing Company and meet Louie Trapini.

Q. What did you do with the \$1,000.00? A. I gave it to John's brother, Larry Collins. We went down and paid Louis Trapini \$1,000.00 on this liquor license.

Q. You paid \$1,000.00 on the liquor license? A. Yes; and Trapini was going to 'grease the track' and see that the liquor license was issued.

Q. How did you give the thousand dollars into this matter? A. As I recall, I went up to John Collins' house, and his wife wrote a check. I met Larry Collins down at our place, at the liquor store, the bar, and went over to the bank and cashed the check with Larry Collins and went down and gave him the money, and went down to the Bohemian Distributing Company.

Q. Your testimony is, you gave \$1,000.00 in cash, is that right? A. That's right.

Q. Did you later on receive \$2,500.00 from Mr. Collins? A. I did not."

After further discussion of the bankrupt's insurance policies, including his health and accident policies covering surgical expense benefits, laboratory, X-ray expense benefits, and additional accident expense benefits [Tr. p. 263], the hearing was then adjourned to December 8th at 10 o'clock. At that time, he was questioned regarding an additional \$4,100.00 of liability owing to his brother, Lawrence Collins, which case No. 639,780 was pending in the Superior Court. He had not included that figure among his liabilities. His deposition had been taken in connection with that suit and a court reporter's bill remained unpaid for a copy of the deposition. [Tr. pp. 266, 267.] At page 268, the Referee summarized the bankrupt's liabilities at \$8,867.23, and said that he would make no comment on the Collins-Lefringhouse note which was then in suit in Superior Court action No. 639,780. On the asset side, he gave him credit on the furniture at a value of \$2,000.00, the tools at \$300.00, his phonograph records at \$150.00, the liquor in his garage at

\$200.00, the bar glasses at \$40.00 [Tr. p. 269], the accounts receivable as of no value whatsoever; the Columbia National Life Insurance Company policy cash surrender value \$180.28; Metropolitan Life Insurance Policy, \$134.92; Policy No. 16245450, \$60.25; Policy No. 540980754, no cash surrender value, and the group of policies, five in number, on the lives of Ada Collins, John R. Collins, Paul Andrew Collins, Ada J. Collins and Pauline J. Collins, the cash surrender value was payable to the insured and not to the bankrupt. [Tr. pp. 270, 271.] The Referee, at page 273, arrived at the total cash surrender value on all policies of \$1,403.75.

He found the claim against Lefringhouse to be entirely unliquidated and that it was impossible in this proceeding to determine whether it constituted an asset or a liability, and included in that was the \$4,100.00 note signed by both Collins and Lefringhouse. He eliminated the Lefringhouse transaction entirely, either as an asset or liability. [Tr. p. 274.] He eliminated the unliquidated claim for damages to the minor son, on the same page. He commented that the evidence on the \$1,500.00 worth of uncashed checks was so vague that the court must make a finding that no such assets were in evidence.

It was the duty of the bankrupt to have turned over any assets which he claimed to the receiver who was the predecessor of the trustee in bankruptcy to be thereafter elected. This, he did not do. This court in *Gardner v. Johnson*, 195 F. 2d 717, following the rule laid down in *Chicago, B. & Q. R.R. v. Hall*, 229 U. S. 511, said:

“It is true that title to exempt property does not vest in the trustee, and cannot be administered by him for the benefit of the creditors. But it can pass to the trustee as a part of the estate of the bankrupt, for

the purposes named elsewhere in the statute, included in which is the duty to segregate, identify, and appraise what is claimed to be exempt.”

In fact, concealment of assets from a receiver is in itself a felony under Title 18, U. S. C. A., Section 152. He found the deposit with the Vista Escrow Company of \$3,000.00 to be so indefinite that no asset value could be attached to it and that Mr. Collins had no asset so far as the Vista Escrow was concerned. He then took up the compensation claim in which the bankrupt had indicated there might be a recovery of \$3,625.00 against which there was a lien of \$1,000.00. He pointed out that there would be an attorney's fee payable against such award, if definitely made. At the suggestion of bankrupt's counsel, Miss Hofstetter, the Referee pared down the anticipated attorney's fee to \$250.00 which was stipulated to by counsel for the petitioners. At page 277, counsel for the bankrupt said that she could not think of any other assets. The court then concluded that the bankrupt was actually insolvent and directed the preparation of findings accordingly.

In the findings of fact filed by the Referee [Tr. p. 16], the Referee found that the bankrupt was insolvent and that all of his assets, including property which would be exempt under the laws of the State of California taken at a fair valuation totaled in value the sum of \$7,068.75, and that his total liabilities as of the date of filing of the involuntary petition amounted to, and did then amount to, the sum of \$8,800.67, and that he had committed an act of bankruptcy in transferring his liquor license to his friend, Fred De Carlo, without consideration within four months prior to the filing of the petition. [Tr. pp. 15, 16.] An order was made adjudging Collins to be a bank-

rupt in accordance with said formal findings. A review was taken and on representation of the bankrupt that his wife had been ill in the hospital, at the conclusion of the hearing, Judge Yankwich remanded the matter to Referee Brink to take her testimony and determine again what he considered the true facts regarding the homestead, which stood in the wife's name. Her testimony was taken starting at page 281 of the Transcript. She testified that she had no conversation with Mr. Collins as to how the property should be vested; that he never told her to have the property deeded to her in her name only; that he never told her that the property was hers and that she never considered the property her separate property. She admitted on cross-examination that she had charge of the opening of the escrow, but that she did not know whether she had directed it to be put in her name, that it was done as a matter of convenience so that she could take care of things so that he could go back east and get the money.

In response to the question:

“Q. You were the one that directed the deed to be made to you?”

She answered:

“A. I don't know whether I should answer ‘yes’ or ‘no.’ Do you have to direct someone?”

We have gone into detail on the testimony to an unusual extent for the purpose of demonstrating the conflict in the evidence and the confusion between the bankrupt and his wife as to whether or not the home property which in any event was safe from attack by creditors should be considered as the wife's separate property or community property. The Referee in Bankruptcy, Honorable Benno M. Brink, was the original trier of the facts. He saw the witnesses and had a chance to judge their credibility.

He conscientiously tried to reconcile the shifty and evasive testimony of Collins into some sort of pattern whereby he could determine the truth. He wound up at page 286 of the Transcript by stating from the bench that Collins' testimony was so utterly unreliable that the court could not place any confidence in it, and at page 293 he commented on the fact that Mrs. Collins was simply going along with him.

Specifications of Error.

The specifications of error here are so closely related that they can all be grouped under one discussion. We contend that the District Judge erred in reversing the Referee's order adjudicating the bankrupt to be a bankrupt; that he erred in not confirming the Referee's order, and in point III that he erred in attempting on a cold record of conflicting evidence to evaluate the testimony of the bankrupt and his wife as to the value of the bankrupt's homestead, and in finding that the bankrupt's assets exceeded his liabilities, and in reversing the order made by the trier of facts, the Referee, who had seen the witnesses, heard them testify and judged their credibility.

The Law.

We believe that the court cannot but feel after a careful reading of the record in this case that Referee Brink exerted the utmost of patience and fairness in the face of a conflicting mass of testimony largely given by a slippery, elusive and mendacious bankrupt. This bankrupt was ready to pattern his testimony to support his own convenience at any given moment. When the receiver was trying to locate assets, he conveniently told the first of two stories; namely, that his wife claimed to own the home in which they lived. He conveniently forgot about

the accounts receivable which he paraded before the court under such cryptic names as "Tex," "Smitty," "Clete," "Sites," "Jimmy," "Cliff" and "Bart," with no addresses at which they could be located. He listed life insurance policies on the lives of his children and wife, and even a health and accident policy, as assets. He had transferred his only available non-exempt, valuable asset, his liquor license worth between \$4,500.00 and \$5,000.00, to a friend of his, Fred De Carlo, for nothing, and had done this in the face of two or three judgments in the Municipal Court held against him by the Intrastate Credit Bureau. [Tr. pp. 83, 84.] He had removed all of the liquor from his place of business and dissipated it either by drinking it himself, passing it out for Christmas presents, or at parties. His home had a declaration of homestead on it and was safe from creditors. His life insurance was likewise beyond the reach of creditors. (See Cal. Code Civ. Proc., Sec. 690.19.) His household furniture was likewise exempt under Section 690.2 of the Code of Civil Procedure. Yet, he persisted in placing fantastic values on non-existent assets, in utter disregard of the rights of his creditors to realize what they could out of the liquor license which he had given away to De Carlo. Referee Brink, after repeated hearings beginning September 6, 1955, and recurring on November 4, 1955, November 14, 1955, December 5, 6 and 8, 1955, lost all confidence in the bankrupt's integrity and honesty, and was satisfied in his own mind that the bankrupt was not telling the truth. The District Judge, acting as a reviewing court under Section 39c of the National Bankruptcy Act (11 U. S. C. A., Sec. 67c), attempted to evaluate the conflicting testimony in this case, and we submit erred in reversing the Referee on findings of fact based on conflicting evidence.

In so far as the bankrupt's homestead is concerned, the fact remains that the Referee was the Judge of the credibility of the witnesses as to the circumstances surrounding the taking of the title in the bankrupt's wife's name. In the first place, *Section 164 of the Civil Code of California* raises the presumption that:

“Whenever any real or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument.”

This presumption is evidence and is disputable, but the sufficiency of the testimony to refute it is within the sound discretion of the trier of fact.

In the case of *Auener v. Suiter*, 46 Cal. App. 301 at 304, the court said:

“We have, then, a case where the wife held a grant, bargain, and sale deed of the property executed to her as sole grantee. This is strong evidence in favor of the respondent's case and must prevail unless overcome by other evidence.

It is true that the presumption established by section 164 of the Civil Code is not conclusive but may be disputed and overcome by other testimony. Nevertheless, however, the presumption is itself evidence which may outweigh the positive testimony of witnesses against it, and will stand as evidence in the case until it is overthrown by other testimony. (*Volguards v. Myers*, 23 Cal. App. 500.)

The other evidence in the case showing the community source of the purchase price, the testimony of the plaintiff that he did not give the property to his wife, only raises a conflict of evidence upon the issue, and the force of it as tending to overcome the presumption was somewhat weakened by the appellant's testimony to the effect that before the deed was made he and his wife had talked it over and she wanted it in her name because she thought he would die first and such a deed would cause her less expense and trouble.

The presumption declared in section 164, although disputable, is itself evidence, and it is for the trial court to say whether the evidence offered to overthrow the presumption has sufficient weight to effect that purpose. (Pabst v. Shearer, 172 Cal. 239; Gilmour v. North Pasadena Land etc. Co., 178 Cal. 6.)

Treating the presumption as evidence, we have a case wherein the trial court has made a finding upon conflicting evidence. It has found that the presumption has not been overcome. Its finding has evidence to support it. We see *no legal cause to interfere with its conclusions.*" (Italics ours.)

In the case of *Nichols v. Mitchell*, 32 Cal. 2d 508, the Supreme Court of California in discussing the argument that no evidence was introduced to dispel the presumption raised by Section 164 of the Civil Code, at page 606, said:

"But the trial court was not concluded by defendants' testimony as to the source of the consideration for the purchase of the property. It was entitled to consider the situation of the parties at the time of the purchase in 1937, the circumstances that may have occasioned the placing of the title in Mrs. Mitchell's name, and the legitimate inferences arising therefrom which precipitated into essential conflict

the issue as to the separate or community character of the property. This province of the trial court to resolve 'conflicting evidence or conflicting inferences' and to reach a conclusion that will not be disturbed 'on appeal if some substantial evidence or reasonable inference' lends support thereto (Security-First National Bank v. Bruder, 44 Cal. App. 2d 767, 772) was forcefully declared in the recent case of Hicks v. Reis, 21 Cal. 2d 654, at pages 659-660: 'The trier of the facts is the exclusive judge of the credibility of the witnesses. (Sec. 1847, Code Civ. Proc.) While this same section declares that a witness is presumed to speak the truth, it also declares that 'This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony . . . or his motives, or by contradictory evidence.' In addition, in passing on credibility, the trier of the facts is entitled to take into consideration the interest of the witness in the result of the case. (Citing authority.) Provided the trier of the facts does not act arbitrarily, he may reject *in toto* the testimony of a witness even though the witness is uncontradicted. (Citing cases.) . . . (As) the court, in Market Street Ry. Co. v. George, 116 Cal. App. 572, 576, stated: 'It has always been the rule that courts and juries are not bound by mere swearing no matter how positive, unless it be credible swearing. It may bear within itself the seeds of its own destruction, as where it is inherently improbable, or its destruction may be wrought from without, as where the person swearing is in some manner impeached. In either case court and jury are entitled to disbelieve the testimony if they choose, and if they do refuse it credence it is of no more effect than if it had not been given. It disappears from the case and the inference opposed to it is no longer contradicted.' "

For additional authorities on the subject of the discretion of the trial court we cite *Nevins v. Nevins*, 129 Cal. 2d 150, 154; *Fanning v. Green*, 156 Cal. 279, 284, and *Estate of Jolly*, 196 Cal. 547.

In the case at bar, the Referee was not satisfied by the testimony of the bankrupt and his wife that they had overcome the presumption contained in Section 164 of the Civil Code especially in view of the bankrupt's earlier testimony *that his wife claimed that the home belonged to her*. [Tr. p. 56.] He only changed his testimony when he realized that it would take the value of the homestead to make him solvent and thus escape the consequences of a bankruptcy proceeding which would probably result in setting aside the fraudulent transfer of his liquor license and possible denial of his discharge.

The District Judge Erred in Evaluating the Testimony Given Before the Referee Who Had an Opportunity to See the Witnesses, Judge Their Attitude and Demeanor and Ascertain Their Credibility.

Prior to the amendment of 1938, the Referee in bankruptcy was a mere arm of the court and had decidedly limited jurisdictional powers. In connection with an adjudication, a matter could be referred to him as Special Master to hear and report the facts to the District Judge who alone could make an adjudication in a contested case. (See Collier on Bankruptcy (14th Ed.), Sec. 22.01, p. 402.) In the same volume of Collier at page 1399, Section 38.03, the author says:

“Under the terms of clause (1) of Sec. 38, referees are invested with jurisdiction to ‘consider all petitions referred to them and make the adjudications or dismiss the petitions.’ Before amendment by the 1938

Act, this clause contained the phrase 'by the clerks', which immediately followed the word 'them.' This was because under the former Act no reference of any petition could be made until after an adjudication, except in certain circumstances where the judge was absent from the district or division of the district in which the petition was filed. In the latter case the clerk could then refer the matter to the referee. Although judges frequently referred the issues to a referee as a special master to hear and report, the referee could not decide the issue of adjudication.

The old procedure, however, was altered under the 1938 Act by the amendment of Sec. 22, and the rephrasing of Sec. 38(1). Under the present law, reference to a referee as such may be made 'at any stage of the proceedings', and in all involuntary cases, therefore, under the terms of Sec. 38(1), the referee may make the adjudication or dismiss the petition, if the case is referred prior to such action. In voluntary cases, except where a partnership petition is filed by less than all the partners, the provisions of Sec. 18g appear to require that the judge make the adjudication."

In the case of *Ott v. Thurston*, 76 F. 2d 368, the court said:

"Another error stressed by appellant is that the Judge of the District Court erred in holding that where the evidence introduced before the referee in bankruptcy was conflicting, he was not at liberty to disregard the referee's findings. In that connection, the District Court stated in its opinion: 'The evidence was at least conflicting, the District Court is not at liberty to disregard the Referee's findings, for they find sufficient support in the evidence,' The court was here expressing the general rule of practice on review or appeal.

It is the recognized rule of the federal courts—and especially in matters of bankruptcy—that on review of the decision of a referee, based upon his conclusions on questions of fact, the court will not reverse his findings unless the same are so manifestly erroneous as to invoke the sense of justice of the court. *In re Stout*, 109 F. 794 (D. C. Mo.). See, also, *In re Noyes Bros.*, 127 F. 286 (C. C. A. 1).

As stated in O'Brien's Manual of Federal Appellate Procedure (1934 Cum. Supp., p. 63): 'The Court of Appeals for the Ninth Circuit, quotes with approval the language of Remington on Bankruptcy, footnote to Sec. 3871, 4th Ed., Vol. 8, p. 227: "And it is especially true that the reviewing courts will not disturb findings of fact except for manifest error, where both the referee and the district judge have coincided." And the findings of a chancellor, based on testimony taken in open court, are presumptively correct and will not be disturbed on appeal, save for obvious error of law or serious mistake of fact.' *Neece v. Durst*, 61 F. (2d) 591, 593 (C. C. A. 9); *Swift v. Higgins*, 72 F. (2d) 791, 796 (C. C. A. 9); *Exchange Nat. Bank v. Meikle*, 61 F. (2d) 176, 179 (C. C. A. 9)."

This rule was followed by Judge Yankwich's colleague, Judge James M. Carter, in *In the Matter of Lawrence Leo Duffin, Debtor*, 141 Fed. Supp. 869 at 870:

"The district court is not at liberty to disregard the referee's findings where they have sufficient support in the evidence, and the findings of the referee will not be overturned unless they are clearly erroneous. *Ott v. Thurston*, 9 Cir., 1935, 76 F. 2d 368; *Powell v. Wumkes*, 9 Cir., 1944, 142 F. 2d 4; *In re F. P. Newport Corp.*, D. C. Cal., 1954, 123 F. Supp. 95.

Petitioners argue that thie testimony regarding the privilege to use the dance area—by the bar patrons and during the hours that the band was not present—was uncontradicted and that the findings of the referee contrary to such testimony are erroneous. The proposition that where a witness' testimony is not contradicted, the trier of fact has no right to refuse to accept it, is erroneous. If the testimony lacked credibility it was not proof, even if uncontradicted. *N. L. R. B. v. Howell Chevrolet Co.*, 9 Cir., 1953, 204 F. 2d 79; *Quon v. Niagara Fire Ins. Co. of N. Y.*, 9 Cir., 1951, 190 F. 2d 257; *Herbert v. Riddell*, D. C. Cal., 1952, 103 F. Supp. 369. Furthermore, such testimony may satisfy the trier of fact not only that the witness' testimony is not true, but that the truth is the opposite of his story, *N. L. R. B. v. Howell Chevrolet Co.*, *supra*. The referee had the opportunity to observe the manner and demeanor of the witness. Furthermore the physical arrangement of the premises and the lack of visible notices not to use the dancing area was evidence giving support to the referee's findings."

In the case at bar, the testimony of the bankrupt, himself, that his wife claimed to own the property occupied by them as their home, coupled with the physical fact that the title was taken expressly in her name, created a substantial conflict in the evidence which the Referee, who saw the witnesses, was in a far better position to evaluate than would a District Judge sitting as a reviewing court and examining a cold record.

Conclusion.

We respectfully submit that the District Judge was in error in reversing Referee Brink in this instance. Throughout the entire record one cannot but observe a pattern of chicanery and fraud on the part of this alleged bankrupt. He and his wife came out here from New York State leaving behind them bank accounts in Niagara Falls apparently standing in both their names. New York is not a community property state, and a married woman has all rights in respect to property, real or personal, and acquisition, use, enjoyment, and disposition thereof, to make contracts in respect thereto, and to carry on any business, trade, or occupation, and to exercise all powers and convey all rights in respect thereto in respect to her contracts and be liable on such contracts as if she were unmarried. (See New York Domestic Relations Law, Sec. 51.) They decided to buy a house in California, after they came here [Tr. p. 198], and the bankrupt appears to have engaged in other business enterprises preceding his venture in Stan's Stage Coach Stop. One of these was money lending. [Tr. p. 59.] Another was the ownership of a drinking establishment known as The Schooner. [Tr. p. 138.] They took the title to their home in the name of Ada J. Collins, the bankrupt's wife. The bankrupt then went into the cocktail lounge with Stan Lefringhouse and obtained a liquor license which was issued in the name of the bankrupt alone, although the money used to induce Trapini to "grease the tracks" for the issuance of such license appears to have come from Lefringhouse. [Tr. p. 257.]

Stan's Stage Coach Stop was opened with the stock, fixtures, equipment, and everything but the license having been paid for by Lefringhouse. Differences arose between

the bankrupt and Lefringhouse, and the bankrupt, after incurring substantial liabilities in the operation of the business, looted the same of the stock in trade, took the liquor out to his home and placed it in his garage, took the license off the wall, and transferred it to a friend, Fred De Carlo. [Tr. p. 110.] No consideration whatever was paid the bankrupt for this license. [Tr. pp. 78-79.] He transferred it within four months of the filing of the petition without any consideration whatsoever, and that notwithstanding the fact that there were suits pending against him, or judgments already rendered in the Municipal Court of the Los Angeles Judicial District, and one in the Superior Court brought by his brother against him and Lefringhouse, in which case he had conveniently not been served, although Lefringhouse was. He claimed to have accumulated \$1,500.00 in uncashed compensation checks which he did not disclose to his receiver. The first any one learned of their existence was early in the trial of the contested adjudication which started November 4, 1955, when he endeavored to set them up as an asset to prove his solvency. A demand that he produce these alleged uncashed compensation checks for our examination resulted in his testifying that he had cashed them all, and although he had represented to the court in his list of assets and liabilities that he had \$1,500.00 of compensation checks uncashed, it later developed beyond all certainty that such representation was false and not true.

He produced as alleged assets life insurance policies on the lives of his wife and his children in which he had no interest whatever in the cash surrender value. He produced a list of accounts receivable with cryptic names, no addresses, and had the effrontery to value them at \$2,200.00.

At the conclusion of all the evidence, the Referee declined to give his testimony any more credibility than he would accord to the mythical Baron Munchauson, and found his self-serving testimony to be untrue.

On the earnest plea that Mrs. Collins had been in the hospital, at least on the last day of the trial, Judge Yankwich remanded the matter to Referee Brink to take her testimony and to consider the entire matter in the light of such additional testimony. This, Referee Brink did. He listened to her testimony and was convinced from her hesitating manner, for example, answer at Transcript, page 284:

“It is in my name. Is that what you want me to say?” that Mrs. Collins was merely going along with her husband in asserting the property which was already exempt as a homestead was community property. The Referee was emphatic in his statements from the bench and in his Certificate on Review [Tr. p. 28], that he did not believe the testimony given by John Collins as to the circumstances in which the title to the home was taken in the name of the wife, and that his position is not changed from that originally taken because he is of the view that “the testimony of both the bankrupt and his wife to be entirely self-serving and unworthy of belief by this court.”

This is not a case where a trier of fact made simple findings and is therefore presumed to have believed one set of witnesses and not another. In this case, the Referee emphatically stated that he did not believe the testimony of either Collins or his wife. Thus, the question of credibility was definitely passed on twice by the Referee, and after the second review, reversed by the District Judge on a cold record.

As was stated by Circuit Judge Lemmon in the recent case of *Autrey Brothers, et al. v. Chichester*, No. 15093, decided January 18, 1957:

“We have frequently adverted to the well-established principle that ‘courts of bankruptcy are essentially courts of equity.’ Judged in accordance with an equitable norm, the individual and corporate manipulations of the appellants herein with reference to the bankrupt’s property, are such as to offend the conscience of a discerning chancellor.”

In the case at bar, the conduct of Collins throughout was such as to offend the conscience of the discerning chancellor Referee Benno M. Brink who saw the witnesses and heard the testimony firsthand over a period of days. His findings on the evidence were emphatic, and we submit that the District Judge erred in reversing his order of adjudication.

We respectfully submit that the order of the District Judge should be reversed with directions to affirm the order of the Referee.

Respectfully submitted this 13th day of February, 1957.

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Of Counsel.

No. 15234.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ACME DISTRIBUTING COMPANY, CALIFORNIA BEVERAGE
& SUPPLY Co. and YOUNG'S MARKET COMPANY,

Appellants,

vs.

JOHN COLLINS, doing business as STAN'S STAGE COACH
STOP, Alleged Bankrupt,

Appellee.

BRIEF OF APPELLEE.

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FILED

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Appellee.

BRIEF OF APPELLEE.

Jurisdiction.

Appellee adopts and incorporates herein the jurisdictional statement of Appellants.

Statement of the Case.

Counsel for Appellant under the captions "The History of the Case" and "The Pleadings" set forth their version of what they probably intend to be the statement of the case required by the rules of this Court. Such matter so set forth is garbled in that it contains both statement of fact in part, argumentative matter in part, and erroneous interpretation in part of portions of the testimony contained in the transcript of record referred

to. We ask that the Court disregard the argumentative feature in construing a true statement of the case.

On page 5 of Appellants' brief, in reference to an examination of the bankrupt at the instance of the receiver, it is said that the bankrupt testified that his wife claimed this home property as her own. The reference is to the Reporter's Transcript, page 56, reading as follows:

"Q. Does she claim it as her own property, do you know? A. Well, she says it is. I don't know. We bought it in 1951, when we came here."

The question was not whether the wife owned the property as her separate or community property.

We think it evident the bankrupt started to say what the wife said, but did not finish, and ended by answering the question as to whether he knew, saying "I don't know. We bought it in 1951 when we came here."

We ask also that the court consider the testimony of Temperance Bailey, escrow clerk [Supp. Tr. of R. pp. 304-305] not referred to in the Statement of Counsel for Appellant, wherein Mrs. Bailey testified in effect that "if a conveyance to a married woman was intended as her separate property, it would be necessary to either so state in the conveyance, or a quitclaim deed be executed by the husband."

Preliminary Statement Relative to Questions Involved.

The principal questions to be determined on this appeal is the question of solvency, and whether or not the finding of insolvency by the Referee is unsupported by the evidence. We shall, therefore, devote the major portion of our argument to these questions.

ARGUMENT.

Application to Transfer Not Tantamount to Transfer.

Section 1:30 of the Bankruptcy Act defines transfer as follows:

“ ‘Transfer’ shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein, or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily, or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage lien, encumbrance, gift, security or otherwise.”

All that was done by the alleged bankrupt in the present case was to file an application with the Alcoholic Beverage Control of the State of California to transfer said liquor license to one Fred De Carlo. Said application to transfer is still pending. No transfer has been effected. Section 3b of the Bankruptcy Act provides as follows:

“b. A petition may be filed against a person within four months after the commission of an act of bankruptcy. Such time with respect to the—first—act of bankruptcy shall not expire until four months after the date when the transfer or assignment became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred or assigned superior to the rights of the transferee or assignee therein.”

It is plain that this section 3b is a limitation of the time within which a petition in bankruptcy may be filed.

The purpose of such a provision is to prevent fraudulent transfers from becoming impregnable to attack by

virtue of their being kept secret until the limitation period has lapsed. Such provision can certainly have no magic effect to convert an act not constituting a transfer into a transfer.

Insolvency at the Time of Filing Petition in Bankruptcy Is Complete Defense.

Sec. 3(c) of the Bankruptcy Act provides as follows:

“It shall be a complete defense to any proceedings under the first act of bankruptcy to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing of the petition against him. If solvency at such date is proved by the alleged bankrupt, the proceedings shall be dismissed——”

Section 1 (19) of the Bankruptcy Act defines insolvency as follows:

“A person shall be deemed insolvent within the provision of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts.”

The Alleged Bankrupt Did Not Commit the Act of Bankruptcy Complained of.

The chief issue in this appeal is the solvency of John Collins, the alleged bankrupt, at the time of the commission of the alleged fraudulent act, and at the time of the filing of the involuntary petition in bankruptcy against him. If he were solvent on the 4th day of August, 1955, the day on which he made application to transfer his said on sale general distilled liquor license, then he

did not commit any act of bankruptcy, and if he were solvent on the 22nd day of August, 1955, the date on which the involuntary petition in bankruptcy was filed against him, then the proceedings should be dismissed.

We contend that the finding of insolvency by the Referee is not supported by the evidence, in that the Referee failed to include among the assets of the alleged bankrupt community real property in which the bankrupt had an equity of \$6,000.00. The Referee in his finding No. IV [Tr. 16] found as follows:

“IV.

“That the Referee finds that the bankrupt is insolvent; that all of his assets including property which would be exempt under the laws of the State of California, taken at a fair valuation, total in value the sum of \$7,068.75, and the bankrupt's total liabilities as of the date of the filing of the involuntary petition herein amount to, and do now amount to, the sum of \$8,867.23.”

A summation of the assets included by the Referee in arriving at the sum of \$7,068.75, and a summation of the liabilities in arriving at the sum of \$8,867.23 are found in the Transcript of Record, commencing at page 267 and ending on page 277. The learned Federal Judge in effect accepted such finding of the Referee as far as it went, but found that the Referee erred in not including among the assets the equity of the alleged bankrupt in the real property.

In his Findings of Fact, the learned Federal Judge, in Finding No. III [Tr. 38], found as follows:

“III.

“The real property situate at 10423 East Townley Drive, Whittier, California, being the property in which the alleged bankrupt resides, was purchased

with community funds of the alleged bankrupt and his wife, Ada Collins, and is community property of the alleged bankrupt and his wife. Title to said property was taken in the name of Ada Collins, the wife of the alleged bankrupt for convenience only. The alleged bankrupt and his wife did not intend and there was no intention on their part, that said property become the separate property of the wife. The value of the equity of the alleged bankrupt and his wife in and to said real property is \$6,000.00, and such equity is a portion of the assets to be taken into consideration in determining the solvency or insolvency of the alleged bankrupt."

And in Finding No. V [Tr. p. 39] found as follows:

"V.

"The alleged bankrupt was not insolvent on the 22nd day of August, 1955, the date of the filing of the involuntary petition in bankruptcy against him. At said time all of his assets, including property which would be exempt under the laws of the State of California, but excluding said distilled spirits license, taken at a fair valuation, total in value the sum of \$13,068.75, and the alleged bankrupt's total liabilities as of the date of the filing of the involuntary petition against him amounted to, and do now amount to, the sum of \$8,867.23."

Evidence Was Sufficient to Warrant the Inclusion of Real Property Among Bankrupt's Assets.

The entire question of solvency turns upon the proposition whether the home occupied by the bankrupt and his family at Whittier, California, was the wife's separate property or not.

We believe without question the evidence before the Referee was sufficient to have required the Referee

to include such property among the bankrupt's assets. Though title to the property was taken in the name of the wife of the bankrupt, it is the intent of the parties and not the form of the grant or the source of the funds which is determinative of the title to the property. However, in the instant case, the property was purchased with community funds. Section 164 of the Civil Code of the State of California, in defining community property, states:

"All other property acquired after marriage by either husband or wife, or both, including real property situated in this State and personal property *wherever* situated heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property."

John Collins in reference to the source of the funds to purchase the real property [Tr. p. 198] stated in response to the following question, as follows:

"Q. At the time of your marriage to Ada Collins, did you have any moneys of your own? A. No.

Q. You accumulated money, did you, after your marriage? A. Yes.

Q. Where did you keep those moneys in the State of New York? A. Usually. Well, some at home and some in the bank.

Q. Where—do you live now? A. 10423 Townley Drive, in Whittier.

Q. That place was purchased, was it, after you and Mrs. Collins came to California? A. That is true.

Q. From what source was the money obtained to purchase that property? A. From the bank—the

Power City Trust Company—a bank in Niagara Falls, New York.

Q. Those were funds that were accumulated through your earnings, during your marriage?

A. Yes, and my wife. The account was in the name of John A. and Ada J.”

Nowhere in the evidence is there anything to show that the bankrupt intended that the property involved be the separate property of his wife, but there is ample undisputed evidence to prove that the bankrupt did not intend that the property be the separate property of his wife.

Title to the property was taken in the name of Ada J. Collins, a married woman. [Tr. p. 199.]

The bankrupt [Tr. p. 201] testified at length as to a conversation had in reference to buying the house; part of which conversation is as follows:

“A. We got to talking about buying the house there, and I had just come to California. I had explained to Mrs. Bailey, the escrow officer, that I had paid \$100.00 down on this house. My wife had seen it and she liked it and I liked it, we were all happy. We agreed on the price, \$13,100.00. This was just before Christmas, I don’t remember what date it was, but about the 17th I think, and we wanted to try to move in before Christmas so that the kids could have a tree and everything. Mrs. Hogin was objecting to us moving in unless we could prove we had enough money to buy the house—we had to put up some \$5,000.00 difference from what was owed on it to make the arrangement. I was going to just give them a check on it. She said if I could put the \$5,000.00 in the bank, she would let us move in before Christmas. Well, the

bank objected to the check because it was a personal check on the Power City Bank, and they said, 'How do we know whether you have any funds there?' I said, 'I would call the bank by telephone and they will tell you.' They said, 'No' they could not do that because I could draw it out before this check got over there.' * * * I said, 'If I went over and got the money would you let us move in?' She said, 'I don't care as long as you put up the \$5,000.00.' I said, 'All right, I will do that.' I went and I got the money and brought it back to the bank."

Mr. Collins further testified at page 202:

"Mrs. Bailey said something about community property, and asked me if I knew what it was all about; and she said, 'If you want to put this property in your wife's name, that is, it is her property and you have nothing to do with it, you will have to sign off these extra papers they have in the bank, or the title company' she said, would not issue the title.

"I said I did not want it to be her separate property; it came from our life savings, it belonged to all five of us, my wife and three kids. Anyway, she went ahead and my wife signed the paper and made the arrangement with the title company, they insured it on the assumption it was community property."

On the tax assessor's records, the property is assessed to "John A. Collins and Ada Collins." [Tr. 204.]

Further [Tr. p. 208] Mr. Collins testified as follows:

"Q. Mr. Collins, did you ever execute a quitclaim deed or any instrument conveying any interest in this property to Mrs. Collins? A. When they asked me if it was going to be her own separate

property, they told me if it was going to be that I would have to execute a quitclaim deed, or else have it put on a grant deed. The one we had stated 'Ada Collins, a married woman'—I did not want it put down as hers or hers alone separate property.

Q. Did you answer the question I asked? A. Did I sign a quitclaim deed?

Q. Yes. A. I did not."

Further in reference to the source of the purchase price, Mr. Collins testified: [Tr. p. 209.]

"Q. You were putting up the \$5,000.00 out of your savings? A. It belonged to my wife and I. The \$5,000.00 came out of a joint account belonging to my wife and me.

Q. It was your earnings? A. All my life, yes.

Q. What part of it did your wife earn? A. Well, just because my wife is at home, taking care of the kids, I think she earns as much as I do.

Q. I am talking about the income that went into that \$5,000.00 that was back in New York, how much of that income did your wife earn?

The Referee: Did she work? A. She did not work, no.

Further Mr. Collins testified: [Tr. p. 210.]

"Q. Have you any reason now that you can give the Court why you had that property put in your wife's name? A. For the sake of convenience. She was there and she could go ahead and get the escrow started and complete it so that we could move in before Christmas, 1951."

Ada Collins, wife of the bankrupt, testified [P. 282] as follows:

"Q. Where do you reside? A. 10223 East Townley Drive, Whittier.

Q. Is that the property that was acquired by purchase from Mr. and Mrs. Hogan? A. It is.

Q. Did you have any conversation with Mr. Collins as to how the property should be vested?

A. No.

Q. Did Mr. Collins ever tell you to have the property deeded to you, in your name only? A. No.

Q. Did Mr. Collins ever tell you that the property was yours? A. No.

Q. When did you and Mr. Collins marry? A. In 1938.

Q. At the time of your marriage did you have any money or property of your own? A. I did not.

Q. Did Mr. Collins have any? A. No.

Q. What was the purchase price of the property involved here? A. \$13,100.00.

Q. How much was paid down at the time of purchase. A. Approximately \$5,300.00.

Q. Do you know where that money came from? A. Well, it was an accumulation of savings over a period of years from his earnings.

Q. During the time of your marriage, were you ever gainfully employed? A. No."

On page 283 on cross-examination of Mrs. Collins, she testified as follows:

"Q. You had charge of the opening of the escrow yourself? A. Yes.

Q. And you directed that the property be taken in your name? A. Well, I don't know as I directed it be put in my name. It was a matter of convenience, so that I could take care of things so that he could go back East to get the money.

Q. You were the one that directed the deed be made to you? A. I don't know whether I should answer 'yes' or 'no.' Do you have to direct someone?

Q. Who drew the deed? A. I signed the paper if that is what you mean.

Q. You mean the escrow instructions? A. Yes.”

Further at page 284:

“Q. What did you mean by ‘for convenience?’

A. Well, there are papers and things. Naturally they have to be signed when you go into an escrow.

Q. Yes. A. My husband had to go back East to get the money because they would not take a personal check on any out-of-town bank. We wanted to be in there by Christmas, and Mrs. Hogan wanted to be with her husband for Christmas. There was not much time between the time we looked at the place and Christmas. John had to go back East, and someone had to be here to take care of the paper work, and that is the way it was left.

Q. And before he left who directed the title to the property be made to you? A. I did not direct any title to be made to me at all.

Q. Was Mr. Collins the one that gave directions? A. I don’t know.

Q. You don’t know who did? A. All I know is that I signed the papers.

Q. You claim now that you don’t own the property as your separate property? A. We own it together. We don’t own anything that way. What belongs to one belongs to the other. We just don’t live that way.”

Temperence Bailey, the escrow clerk who handled the transactions when the property was purchased, while testifying that she did not remember a particular conversation with the bankrupt, however, substantiates the testimony of the bankrupt when she testified as follows: [Supp. Tr. p. 304.]

“Q. By the Referee: —Mrs. Bailey, you do have occasions in your business to request a title company to issue a policy of title insurance on property which is passing through your escrow, is that not the fact.

A. Yes.

Q. You do have occasions where property is requested to be vested in a married woman as her separate property—you do have those situations?

A. Yes.

Q. When you request a policy of title insurance in that kind of a situation—where the title is to be vested in a married woman as her separate property, do you transmit to the title company any papers in addition to the deed? A. The deed would contain a clause that it was to be—was deeded to the one, the grantee, the property to be the separate property; that there would be an agreement on the deed, signed by husband and wife that it was to be the separate property of the grantee.

Q. In other words, your custom, then, would be that the husband would sign on the deed itself?

A. Yes, either that or on a quitclaim deed, in a separate instrument.

Q. The husband would execute a quitclaim deed?

A. It would be embodied in the instructions.

The Referee: Now, we have the instrument here, as Petitioning Creditors' Exhibit No. 8; and the Court finds nothing with respect to the vesting of the title. You say it would be right on this instrument?

A. Yes.”

As stated by Judge Yankwich in his memorandum opinion [Tr. of R. p. 28] the Findings of the Referee must be accepted unless clearly erroneous. However, if there is no substantial evidence to support it, a finding will not be sustained.

In re Leichter, 3 Cir. 1952, 197 F. 2d 955, at page 957, it is said:

“A finding of fact must have more substantial foundation than an intuition— It is well settled that speculation cannot be substituted for proof.”

The Referee in his Memorandum on Remand [Tr. p. 25] states that he does not believe the testimony of the bankrupt and his wife on the ground that it is entirely self-serving. He entirely disregards the testimony of Temperance Bailey [Sup. Tr. of Record] a purely disinterested person, which in substance substantiates the testimony of both the bankrupt and his wife. He likewise entirely disregards the testimony of Mrs. Collins, although her testimony is absolutely unimpeached. As set forth in the opinion of Judge Yankwich [Tr. of R. pp. 26b-36] and in the cases therein cited by him, the Referee was plainly in error in arbitrarily disregarding the testimony of Mrs. Collins and the testimony of Temperance Bailey in support thereof.

In his said Memorandum Opinion on Petition for Review [Tr. of R. pp. 26b-36], Judge Yankwich has so far stated the law applicable to this case that we deem it unnecessary to amplify our brief by further citation of cases.

We respectfully submit that the Order of Judge Yankwich reversing the order of the Referee be sustained.

Respectfully submitted,

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